Supreme Court, U.S.
FILED

No. 09- 09-543 OCT 27 2009

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

ANTHONY W. LISANTI,
on behalf of himself and all others similarly situated

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARY STOWELL
LINDA D. FRIEDMAN*
RAFAEL E. LÁZARO
STOWELL & FRIEDMAN, LTD.
321 South Plymouth Court
Suite 1400
Chicago, Illinois 60604
(312) 431-0888

* *Counsel of Record* *Counsel for Petitioner*

225962

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Federal court reporters are employees of the United States whose basic statutory duties are: (a) to record judicial proceedings and (b) to produce transcripts of proceedings upon request. 28 U.S.C. § 753. As federal employees, the retirement benefits of federal court reporters are provided under the Civil Service Retirement Act ("CSRA").

Federal court reporters receive two kinds of payments for their work. Their employing agency, the Administrative Office of the United States Courts ("AOUSC"), pays court reporters an annual salary for recording proceedings, which it reports to the Internal Revenue Service ("IRS") on a Form W-2. The AOUSC, however, requires court reporters to obtain payment for the production of transcripts ("transcript income") from third parties and reports this income on a Form 1099. As a result, the Office of Personnel Management ("OPM") considers transcript income to fall outside the CSRA's definition of "basic pay" and excludes it from the calculation of federal court reporter's pensions. This omission results in federal court reporters receiving considerably lower pension annuities than their compensation and work warrant.

The first question presented by this case is:

Whether it is lawful for the AOUSC to classify federal court reporters as both employees on regular tours of duty and independent contractors when federal court reporters perform the essential statutory functions of their positions, and, if this classification is not lawful, whether the AOUSC may exclude transcript income from the pensions of federal court reporters?

The second question presented raises an important issue concerning the application of the class action mechanism to proceedings at the Merits Systems Protection Board (the "Board"). The Board denied Petitioner's motion to certify this case as a class action on the basis that potential class members had to first initiate their own administrative proceedings.

The second question presented is:

Whether class treatment is appropriate as this case challenges the AOUSC's common policy and practice of wrongfully classifying federal court reporters as independent contractors and the resulting unlawful exclusion of wages from pensionable earnings of monies federal court reporters are paid when they perform the essential statutory functions of their jobs?

LIST OF PARTIES

Petitioner is Anthony W. Lisanti on behalf of himself and all similarly situated court reporters. Respondent is the Office of Personnel Management.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	13
A. Factual Background	13
B. The Underlying Litigation	15
C. The Appeal	17
REASONS FOR GRANTING THE PETITION	18
A. The Federal Circuit's Decision is Contrary to Any Reasonable Reading of the Statute.	18

Contents

Page

B. The Federal Circuit's Decision Which Allows the Treatment of Federal Court Reporters as Both Independent Contractors and Employees Warrants Review Because it Places the AOUSC on a Different Footing than Every Other Employer in the Country. 22

C. The Determination that this Case Does Not Meet Class Requirements Warrants Review Because it is Plainly Contrary to Precedent from this Court and the Purpose of Federal Rule of Civil Procedure 23 28

CONCLUSION 31

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Federal Circuit Decided July 29, 2009 ..... 1a

Appendix B — Final Order Of The Merit Systems Protection Board ("Board") Affirming The Office Of Personnel Management's ("OPM's") Determination Dated April 4, 2008 ..... 20a

Appendix C — Initial Decision Of The Board Dated November 19, 2007 ..... 22a

Appendix D — Decision Of The Board Denying Class Certification Dated July 19, 2007 ..... 30a

Appendix E — The Final Decision Of The Office Of Personnel Management ("OPM") Denying Reconsideration Dated May 15, 2007 ..... 34a

Appendix F — The Initial Decision Of The OPM Dated September 26, 2006 ..... 41a

Appendix G — Memorandum Opinion Of The United States District Court For The Northern District Of Illinois Dismissing Court Reporter's Claims For Lack Of Jurisdiction Dated March 9, 1998 ..... 43a

TABLE OF CITED AUTHORITIES

Page

CASES:

Alexander v. Sandoval,
532 U.S. 275 (2001) 21

American Pipe & Construction Co. v. Utah,
414 U.S. 538 (1974) 29, 30

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 18

Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003) 24, 26

Community for Creative Non-Violence v. Reid,
490 U.S. 730 (1989) 24

Cox v. American Cast Iron Pipe Co.,
784 F.2d 1546 (11th Cir. 1986) 28

Crown, Cork & Seal Co., Inc., v. Parker,
462 U.S. 345 (1983) 29, 30

Cutright v. United States,
953 F2d 619 (Fed. Cir. 1992) 23

Diamond v. Diehr,
450 U.S. 175 (1981) 18

Franklin v. Gwinnett County Pub. Sch.,
503 U.S. 60 (1992) 21

Cited Authorities

Page

Hishon v. King & Spalding,
467 U.S. 69 (1984) 26

Kelly v. Robinson,
479 U.S. 36 (1986) 21

Lisanti v. United States,
No. 96-C-0395, 1998 U.S. Dist. LEXIS 2934
(N.D. Ill. Mar. 9, 1998) 15

Nationwide Mutual Ins. Co. v. Robert Darden,
503 U.S. 318 (1992) 24

O'Hare Truck Service et. al.
v. City of Northlake, et. al.,
518 U.S. 712 (1996) 27

Ost v. West Suburban Travelers Limousine, Inc.,
88 F.3d 435 (7th Cir. 1996) 26

Perrin v. United States,
444 U.S. 37 (1979) 18

Southeastern Community College v. Davis,
442 U.S. 397 (1979) 18

United States v. Pittsburgh,
757 F.2d 43 (3d Cir. 1985) 23

Cited Authorities

Page

RULES and REGULATIONS

Federal Rule of Civil Procedure 23 ..... 28, 29

5 C.F.R. § 550.103 ..... 5, 18

5 C.F.R. § 1201.27 ..... 5, 28

STATUTES

5 U.S.C. § 7703 1

5 U.S.C. § 8331 ..... 4, 11, 17, 18, 19

5 U.S.C. § 8334 2

5 U.S.C. § 8339 ..... 2, 18

28 U.S.C. § 753 ..... i, 6, 13, 22, 24

28 U.S.C. § 1254 1

28 U.S.C. § 1295 1

Petitioner Anthony W. Lisanti respectfully petitions this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit entered in this proceeding on July 29, 2009.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") is reported at 573 F.3d 1334 and is reprinted in App., *infra*, A.

The final order of the Board affirming the OPM's determination is dated April 4, 2008 and is reprinted in App., *infra*, B. The decision of the Board denying class certification is dated July 19, 2007 and is reprinted in App., *infra* D. The initial decision of the Board affirming the OPM's decision is dated November 19, 2007 and is reprinted in App., *infra*, C. The final decision of the OPM denying reconsideration is dated May 15, 2007 and is reprinted in App., *infra*, E. The initial decision of the OPM is dated September 26, 2006 and is reprinted in App., *infra*, F.

STATEMENT OF JURISDICTION

The decision of the Board affirming the OPM's determination constitutes a final order pursuant to 5 U.S.C. § 7703. Petitioner timely appealed, and the Federal Circuit had jurisdiction under 28 U.S.C. § 1295(a)(9). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 5, United States Code Section 8339(a) provides in pertinent part:

(a) Except as otherwise provided by this section, the annuity of an employee retiring under this subchapter is—

> (1) 1 ½ percent of his average pay multiplied by so much of his total service as does not exceed 5 years; plus;
>
> (2) 1 ¾ percent of his average pay multiplied by so much of his total service as exceeds 5 years but does not exceed 10 years; plus
>
> (3) 2 percent of his average pay multiplied by so much of his total service as exceeds 10 years.

Title 5, United States Code Section 8331 (3) provides:

> (3) "basic pay" includes—
>
> > (A) the amount a Member received from April 1, 1954, to February 28, 1955, as expense allowance under section 601(b) of the Legislative Reorganization Act of 1964 (60 Stat. 850), as amended; and that amount from January 3, 1953, to March 31, 1954, if deposit is made therefore as provided by section 8334 of this title [5 USCS § 8334];

(B) Additional pay provided by —

(i) subsection (a) of section 60e-7 of title 2 and the provision of law referred to by that subsection; and

(ii) sections 60e-8, 60e-9, 60e-10, 60e-11, 60e-12, 60e-13, and 60e-14 of title 2;

(C) premium pay under section 5545 (c)(1) of this title;

(D) with respect to a law enforcement officer, premium pay under section 5545 (c)(2) of this title;

(E) availability pay —

(i) received by a criminal investigator under section 5545a of this title; or

(ii) received after September 11, 2001, by a Federal air marshal of the Department of Transportation, subject to all restrictions and earning limitations imposed on criminal investigators under section 5545a;

(F) pay as provided in section 5545(b)(2) and (c) 2;

> (G) with respect to a customs officer (referred to in subsection (e)(1) of section 5 of the Act of February 13, 1911), compensation for overtime inspectional services provided for under subsection (a) of such section 5, but not to exceed 50 percent of any statutory maximum in overtime pay for customs officers which is in effect for the year involved; and
>
> (H) any amount received under section 5948 (relating to physicians comparability allowances); but does not include bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation except as provided by subparagraphs (B) through (H) of this paragraph, retroactive pay under section 5344 of this title in the case of a retired or deceased employee, uniform allowances under section 5901 of this title, or lump-sum leave payments under subchapter VI of chapter 55 of this title. For an employee paid on a fee basis, the maximum amount of basic pay which may be used is $10,000;

Title 5, United States Code Section 8331 (4) reads in the pertinent part:

> (4) "average pay" means the largest annual rate resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of credible service . . . with each rate weighted by time it was in effect . . .

Title 5, Code of Federal Regulations Section 550.103 provides in the relevant part:

> Rate of basic pay means the rate of pay fixed by law or administrate action for the position held by an employee, including any applicable locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind.

Title 5, Code of Federal Regulations Section 1201.27 provides in the relevant part:

> (a) Appeal. One or more employees may file an appeal as representatives of a class of employees. The judge will hear the case as a class appeal if he or she finds that a class appeal is the fairest and most efficient way to adjudicate the appeal and that the representative of the parties will adequately protect the interests of all parties. When a class appeal is filed, the time from the filing date until the judge issues his or her decision under paragraph (b) of this section is not counted in computing the time limit for individual members of the potential class to file individual appeals.
>
> (b) Procedure. The judge will consider the appellant's request and any opposition to that request, and will issue an order within

30 days after the appeal is filed stating whether the appeal is to be heard as a class appeal. If the judge denies the request, the appellants affected by the decision may file individual appeals within 30 days after the date of receipt of the decision denying the request to be heard as a class appeal. Each individual appellant is responsible for either filing an individual appeal within the original time limit, or keeping informed of the status of a class appeal and, if the class appeal is denied, filing an individual appeal within the additional 35-day period.

(c) Standards. In determining whether it is appropriate to treat an appeal as a class action, the judge will be guided but not controlled by the applicable provisions of the Federal Rules of Civil Procedure.

Title 28, United States Code Section 753 provides:

(a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.

The number of reporters shall be determined by the Judicial Conference of the United States.

The qualification of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.

Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

(b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the

judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court [as] may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less then ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be

required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefore, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

(d) The Judicial Conference shall prescribe records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerks of the district courts, and may include records showing:

(1) the quantity of transcripts prepared;

(2) the fees charged and the fees collected for transcripts;

(3) any expenses incurred by the reporters in connection with transcripts;

(4) the amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings; and

(5) such other information as the Judicial Conference may require.

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States. For

the purposes of subchapter III of chapter 83 of title 5 and chapter 84 of such title [5 U.S.C.S. §§ 8331 et seq. and 8401 et seq.], a reporter shall be considered a full-time employee during any pay period for which a reporter receives a salary at the annual salary rate fixed for a full-time reporter under the preceding sentence. All supplies shall be furnished by the reporter at his own expense.

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of moneys appropriated for those purposes. Fees for transcripts furnished in proceedings brought under section 2255 of this title [28 USCS § 2255] to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeals is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for transcripts furnished in other

proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporters may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

(g) If, upon the advice of the chief judge of any district court within the circuit, the judicial council of any circuit determines that the number of court reporters provided such district court pursuant to subsection (a) of this section is insufficient to meet temporary demands and needs and that the services of additional court reporters for such district court should be provided the judges of such district court (including the senior judges thereof when such senior judges are performing substantial judicial services for such court) on a contract basis, rather than by appointment of court reporters as otherwise provided in this section, and such judicial council notifies the Director of the Administrative Office, in writing, of such determination, the Director of the Administrative Office is authorized to and shall contract, without regard to section 3709 of the Revised Statutes of the United States, as amended (41 U.S.C. 5), with any suitable person, firm, association, or corporation for the providing of court reporters to serve such

> district court under such terms and conditions as the Director of the Administrative Office finds, after consultation with the chief judge of the district court, will best serve the needs of such district court.

STATEMENT OF THE CASE

A. Factual Background

Anthony W. Lisanti ("Lisanti") was employed as a federal court reporter for the Northern District of Illinois for over thirty-five years. As a federal court reporter, Lisanti was required by federal statute to perform two basic job functions: recording judicial proceedings and producing transcripts upon request to the courts and the parties. 28 U.S.C. § 753.

Lisanti retired in February 2006. His retirement benefits are provided by the federal government under the Civil Service Retirement System ("CSRS"). His pension, however, does not reflect the entire amount of work he performed as a federal court reporter. Rather, the OPM has refused to provide Lisanti with pension benefits for the time and income he earned when performing his statutory duty of transcribing proceedings.

The OPM justifies its actions by claiming that it is lawful for the AOUSC to create a special compensation scheme that no other employer in the nation is allowed to employ: one that pays a salary to federal court reporters for the performance of some of their basic duties, but treats them as independent contractors for

others and requires them to obtain payment from third parties for these tasks. This scheme shifts tax liability to the federal court reporters and deprives them of pension benefits.

The treatment of federal court reporters as independent contractors has historical roots. Prior to 1984, federal court reporters were treated as independent contractors. They controlled the scope of their work, set their own work hours, did not report to a supervisor, engaged in freelance reporting and negotiated their own rates for transcripts.

Significantly, in 1984, AOUSC dramatically altered its relationship with federal court reporters. Beginning in 1984, federal court reporters were to report to a supervisor, work fixed hours, and be subject to an employment manual that controls nearly every aspect of their work. The employment manual, for example, provides mechanisms to discipline court reporters who fail to timely deliver transcripts, requires court reporters to remain available in the courthouse when they are not needed to record proceedings, and requires that court reporters submit regular and timely attendance reports to the Clerk of Court or risk having their salary withheld. The employment manual also controls nearly every aspect of the transcript production process, including the weight and color of paper, margins, spacing, indentations and use of capitalization.

Importantly, commencing in 1984, federal court reporters could no longer engage in freelance reporting work or negotiate rates for transcripts. That year, the Judicial Conference set the maximum rate reporters

could charge for the production of transcripts. Federal court reporters are subject to discipline, including termination if they do not adhere to the established rates.

During Lisanti's employment, he challenged the AOUSC's classification of federal court reporters as independent contractors with the IRS. Lisanti argued that the transcript income reported on his IRS Form 1099 was erroneously reported as independent contractor work because Lisanti, at all times, was an employee of the United States, not an independent contractor. The IRS agreed and for the years 1992 through 1996, 2001, and 2004, refunded the employer's share of payroll taxes Lisanti had paid on this transcript income. The Social Security Administration followed the IRS and credited Lisanti's transcript income to his Social Security earnings record.

B. The Underlying Litigation

In 1996, Lisanti and nine other federal court reporters filed a federal lawsuit against the AOUSC in the Northern District of Illinois. *See Lisanti v. United States*, No. 96-C-0395, 1998 U.S. Dist. LEXIS 2934 (N.D. Ill. Mar. 9, 1998). In the lawsuit, the federal court reporters alleged that the AOUSC improperly classified them as independent contractors and wrongfully excluded transcript income from their pensions. The district court dismissed the federal court reporters' claim for lack of subject matter jurisdiction, holding that the CSRA provides an exclusive review process. That process begins with the OPM and is subject to review by the Board and the Federal Circuit. (App., *infra* G).

The federal court reporters then filed claims with the OPM, which determined that it lacked jurisdiction because none of the federal court reporters had yet retired and applied for retirement benefits.

Eight years later, Lisanti retired and began receiving pension benefits. Because the calculation of his pension benefits did not include transcript income, Lisanti re-initiated his claim with the OPM. In September 2006, the OPM issued an initial decision denying Lisanti's claims. (App., *infra* F). Lisanti then sought reconsideration of the OPM's initial decision. On May 15, 2007, the OPM issued a final determination, which held that the calculation of pension annuities was correct because transcript income did not fall within the CSRA's definition of "basic pay." (App., *infra* E).

Lisanti appealed the OPM's decision to the Board and moved to certify the appeal as a class action on behalf of himself and all other similarly situated federal court reporters. The Board first denied Lisanti's motion to certify the class, on the basis that potential class members had to exhaust administrative remedies at the OPM in order to be counted for numerosity purposes. (App., *infra* D). The Board then issued a decision on the merits. (App., *infra* C). Although it acknowledged that Mr. Lisanti had "raised several compelling arguments to support his contention that his transcript income should have been included in his salary," it held that the Board lacked the authority to review the OPM's reliance on the AOUSC's certified individual retirement record and affirmed the OPM's decision. (App., *infra* C).

Lisanti then petitioned for review of the Board's decision. In a final order issued on April 4, 2008, the Board denied the petition. (App., *infra* B).

C. The Appeal

Lisanti appealed the final decision of the Board to the Federal Circuit. The Federal Circuit determined that the Board erred when ruling that it lacked authority to decide the case. (App., *infra* A). The Federal Circuit deemed not relevant the issue of whether the AOUSC improperly classified federal court reporters as independent contractors when producing transcripts. Accepting that two separate categories of wages existed, salary and transcript income, the Federal Circuit found that Congress included as pensionable income other "additional pay" or "premium pay" for federal employees who perform special work such as hazardous duty pay, but that Congress did not expressly reference transcript income in 5 U.S.C. § 8331(3)(A)-(H). The Federal Circuit further noted the conclusion of 5 U.S.C. § 8331(A)-(H), where Congress states that "basic pay" does not include bonuses. The Federal Circuit resolved that transcript income was analogous to bonuses or overtime pay and affirmed the decision of the Board. (App., *infra* A). The Federal Circuit chose not to review the Board's determination denying the petition for class certification based on its holding that the issue was rendered moot by its holding on the merits. *Id.*

REASONS FOR GRANTING THE PETITION

A. The Federal Circuit's Decision is Contrary to Any Reasonable Reading of the Statute.

When interpreting statutes, "[i]t is elementary that 'the starting point in every case involving construction of a statute is the language itself.'" *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979), *quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). In determining the scope of a statute "words will be interpreted as taking their ordinary, contemporary, common meaning." *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) *citing Perrin v. United States*, 444 U.S. 37, 42 (1979).

Based on the plain language of the statute, basic pay includes the pay federal court reporters receive for the preparation of transcripts. Pension benefits of federal employees are based on "average pay," which is calculated by averaging the highest annual "basic pay" over 3 consecutive years of service. *See* 5 U.S.C. § 8331(4), § 8339 (CSRS) and § 8415 (FERS). The rate of basic pay, in turn, is defined to mean the "rate of pay fixed by law or administrative action for the position held by an employee . . ." 5 C.F.R. § 550.103; *see also* 5 U.S.C. § 8331(3)(H) (referring to "the base pay of the position as fixed by law or regulation. . . .")

Transcript income falls squarely within the definition of basic pay. The operative language of the statute and its regulation refers to basic pay as the "rate of pay fixed by law or administrative action for the position." 5 C.F.R.

§ 550.103; 5 U.S.C. § 8331(3)(H). Since 1984, the rate of pay that federal court reporters can charge for preparing transcripts has been "fixed by the law." Federal court reporters are not free to establish their own fees for transcription services but instead must follow a fee schedule set by the Judicial Conference. Indeed, federal court reporters are subject to discipline, which could include termination, if they choose to ignore the fee schedule and establish their own fees for transcribing procedures. Moreover, under federal law one of the basic duties of federal court reporters – which takes up the majority of their time — is to prepare transcripts. It defies logic to hold that basic pay does not include the pay received by an employee for performing one of the basic tasks of his position.

The AOUSC, however, employs a unique compensation scheme for federal court reporters, causing the exclusion of transcript income from the computation of pension benefits. The AOUSC considers federal court reporters as employees when recording proceedings but as independent contractors when preparing transcripts. Federal court reporters are required to obtain payment for the preparation of transcripts from third parties, but are paid a salary for recording proceedings. When federal court reporters retire, the OPM then excludes transcript income from the computation of annuities based on the circular reasoning that it considers such income to fall outside the CSRA's definition of "basic pay" because it is supplemental to wages.

Throughout the course of this litigation, federal court reporters charged that the AOUSC's requirement

that they obtain payment for the production of transcripts from third parties unlawfully deprived them of pension benefits. No employer in the country is allowed to require its employees to seek payment for the performance of piece meal tasks from third parties, which results in a shifting of tax liability and a denial of pension benefits to the employee. The Federal Circuit, however, held that the government need not justify its payment scheme because the resolution of this case turns solely on whether Congress specifically authorized the inclusion of transcript income in "basic pay." (App., *infra* A). Petitioner respectfully suggests the first question that must be answered is not whether Congress intended that this special category of independent contract wages should be pension eligible but whether it is even lawful for the AOUSC to have created this second category of earnings and classified them apart from basic pay.

An example helps to clarify the issues. Petitioner submits that a similar situation would occur if, for example, the United States Postal Service ("Postal Service") decides to pay postal workers a salary for their time delivering mail, but directs them to obtain payment from customers who purchase stamps and then issues a Form 1099 to postal workers for this income. When postal workers retire, the Postal Service then denies pension benefits under the premise that Congress did not specifically identify the income received from the selling of stamps in the CSRA. The issue, of course, is that when it enacted the CSRA, Congress could not have foreseen that the Postal Service would put in place an unlawful payment scheme that results in a unique category of wage income. It seems self-evident that the

definition of basic pay in the CSRA would not contemplate the income received by postal workers from the selling of stamps to the public because that category of income should not exist.

Similarly, the Federal Circuit wrongly concluded that Congress must rewrite the definition of basic pay to include transcript income in order for these monies to qualify as pension-eligible. (App., *Infra.* A). It is a fundamental principle of statutory construction that lawmakers, in using particular language, are deemed to have in mind the state of the law as established at the time. *See Alexander v. Sandoval*, 532 U.S. 275, 314 (2001) (J. Stevens dissenting) (stating that when faced with statutory construction questions courts must "assume that Congress was fully informed as to the state of the law."); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 71 (1992) ("[I]n determining Congress' intent . . . we evaluate the state of the law when the Legislature passed Title IX."); *Kelly V. Robinson*, 479 U.S. 36, 50 (1986) ("In light of the established state of the law . . . we have serious doubts whether Congress intended to make criminal penalties "debts" within the meaning of § 101(4).12."). Accordingly, when determining the categories of income it needed to address as "supplemental" or outside of basic pay, Congress would not have contemplated a need to expressly provide for and include transcript income within the definition of basic pay because transcript income exists only from the unlawful characterization of federal court reporters as both employees and independent contractors. Congress provided that federal court reporters were to produce transcripts as part of their tour of duty and would have assumed that wages earned for this aspect of the job would not be separate but would be included in the Form W-2, as

this was the basic pay fixed by law for the performance of statutory duties. Plainly, Congress is fully informed of the state of the law and would not have foreseen any need to expressly include or exclude a classification of wages that would exist only if the AOUSC ignored well-settled law to create the independent wage category of transcript income. Unlike workers who receive "supplemental pay" for performing duties above their ordinary duties such as those who receive hazardous duty pay, federal court reporters are paid only for performing the statutory functions of their jobs. Further, payment for producing transcripts is part of the regular earnings of a federal court reporter and is not discretionary as is a bonus. Thus, it is not necessary for Congress to rewrite any laws in order for federal court reporters to receive full pensions. All that is required is that this Court order OPM to properly classify federal court reporters as employees for all purposes and to deem pension-eligible all wages fixed by law paid to federal court reporters for the performance of statutory duties.

B. The Federal Circuit's Decision Which Allows the Treatment of Federal Court Reporters as Both Independent Contractors and Employees Warrants Review Because it Places the AOUSC on a Different Footing than Every Other Employer in the Country.

Federal statute designates federal court reporters as full time employees of the United States. 28 U.S.C. § 753(e) states that:

> [e]ach reporter shall receive an annual salary to be fixed from time to time by the Judicial

> Conference of the United States. For the purposes of subchapter III of chapter 83 of title 5 and chapter 84 of such title [5 U.S.C.S. §§ 8331 et seq. and 8401 et seq.], a reporter shall be considered a full time employee during any pay period for which a reporter receives a salary at the annual salary rate fixed for a full-time reporter under the preceding sentence.

28 U.S.C. § 753(e).

Accordingly, courts and federal agencies have found that federal court reporters are employees of the United States for all purposes, including when preparing transcripts. More specifically, the Court of Appeals for the Third Circuit has held that "Congress intended that court reporters be officers of the court and employees of the United States, and the detailed statutory regulation of their duties in the preparation of transcripts indicates Congress' intent that the court reporters remain such throughout the performance of all of their duties." *United States v. Pittsburgh*, 757 F.2d 43, 47 (3d Cir. 1985); *see also Cutright v. United States*, 953 F2d 619 (Fed. Cir. 1992) (recognizing that federal court reporters became regular employees of the United States in January 1984). The IRS and the Social Security Administration have in essence recognized that the government cannot categorize federal court reporters as independent contractors because these agencies treat transcript income as Form W-2 wages.

The treatment of federal court reporters as both independent contractors and employees is also contrary

to well-established principles enunciated by this Court. In *Nationwide Mutual Ins. Co. v. Robert Darden*, 503 U.S. 318 (1992), this Court faced the issue of whether respondent was an independent contractor or an employee and could bring an ERISA benefits claim against the employer. *Id.* After holding that ERISA failed to appropriately define the term "employee," this Court instructed that when determining if a worker is an employee, courts should examine "the hiring party's right to control the manner and means by which the product is accomplished." Id. at 323 (*citing Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)). Approximately a decade later, this Court reiterated the *Nationwide Mutual Ins.* holding. In *Clackamas Gastroenterology Associates, P.C., v. Wells*, 538 U.S. 440 (2003), the Court faced the issue of whether four individuals qualified as "employees" for purposes of the Americans with Disabilities Act ("ADA"). In holding that the workers were "employees," this Court stated, "the common law element of control is the principal guidepost that should be followed in this case." *Id.* at 448.

Under these standards, federal court reporters are clearly employees and not independent contractors when preparing transcripts. Federal statute provides that transcription of court proceedings is one of two basic employment functions of federal court reporters. *See* 28 U.S.C. § 753. Federal statute also provides that federal court reporters are not free to establish their own fees for transcription services, but must follow the fee schedule set by the courts and the Judicial Conference. *See* 28 U.S.C. § 753(f). Also, the AOUSC controls nearly every aspect of the way that federal court

reporters produce transcripts. These controls include: the size of holes punched, capitalization, margins, and spacing used in transcripts; the prohibition against negotiating for higher transcript rates; the prohibition against engaging in private reporting; requirements to submit regular attendance reports at the risk of having salary withheld; and mechanisms for disciplining federal court reporters who fail to deliver timely transcripts or who fail to adhere to the fee schedule for the preparation of transcripts. In fact, transcripts are not the property of the federal court reporters but are sold to the public at $.08 cents a page ninety days after delivery to the clerk of courts.

In light of the above, the Federal Circuit erred when it allowed the AOUSC to justify the denial of pension benefits based on the unlawful characterization of transcript income as independent earnings. Federal statute and case law designate federal court reporters as full time employees of the United States and the AOUSC undeniably exerts control over a federal court reporter's production of transcripts. Yet, the Federal Circuit allowed the AOUSC to deny pension benefits under the premise that transcript income is independent earnings. By allowing the AOUSC to ignore the rule that no employer can lawfully deny benefits by misclassifying its employees, the Federal Circuit's decision places the AOUSC in a different footing than any other employer in the nation.

The Federal Circuit's decision has far reaching, undesirable consequences that require the intervention of this Court. Because the decision allows the AOUSC to deny pension benefits based on the unlawful

classification of federal court reporters, it leaves federal pension rights unduly dependent on whether the government, at its whim and without regard to its true relationship with its workers, labels a government worker an independent contractor. Moreover, under the Federal Circuit's decision the government can ignore its obligation to pay the employer's share of taxes for work performed by employees within the basic duties of employment. Further, the Federal Circuit's decision certainly could be read to authorize any employer to diminish pensionable income by requiring its employees to collect payments for their work directly from its clients or customers.

Importantly, the decision also leaves the employment rights of federal court reporters in an untenable state of flux. The application of numerous federal statutes, including federal anti-discrimination laws, is often dependent on whether a worker is considered an employee or a contractor. *See e.g.*, *Clackamas*, 538 U.S. at 447, n.6 (the meaning of the term "employee" comes into play when determining whether an individual is an "employee" who may invoke the ADA's protections against discrimination); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 440 (7th Cir. 1996) (independent contractors are not protected by Title VII). For this reason, this Court has warned that courts must be vigilant of employers who manipulate the status of their employees in order to avoid legal obligations and liabilities. *See e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 80, n.2 (1984) (Powell, J. concurring) (an employer cannot evade the strictures of Title VII by labeling its employees as "partners.");

O'Hare Truck Service et. al., v. City of Northlake, et. al., 518 U.S. 712, 721-22 (1996) (warning against the abuse of the term independent contractor, which has the potential of being used by the government to avoid liability for violation of First Amendment rights.)

Here, the decision of the Federal Circuit allows the AOUSC to impermissibly manipulate the employment status of federal court reporters. Because of the AOUSC's dual characterization of federal court reporters, it would be extremely difficult to discern the employment rights that federal court reporters possess. For example, if a federal court reporter is sexually harassed, could he or she sue under Title VII? Could the government argue the claim fails because the reporter was transcribing proceedings at the precise moment the harassment took place? The same concerns would arise if the accused in a sexual harassment case were a federal court reporter. The Federal Circuit's decision ignores these difficulties.

Accordingly, the AOUSC cannot lawfully justify categorizing federal court reporters as independent contractors. Federal court reporters should have been paid wages on a Form W-2 for earnings derived from the performance of their statutory duties, including the preparation of transcripts. Had the AOUSC properly treated these wages as part of basic pay, there would not have been a "supplemental" category of independent contractor earnings and no reason for any court to consider whether this unlawful category of earnings constituted pensionable earnings. Federal court reporters, like all other federal employees, deserve to retire with full pension rights and the AOUSC's

wrongful classification of federal court reporters as independent contractors should not result in a denial of pension benefits to federal court reporters.

C. The Determination that this Case Does Not Meet Class Requirements Warrants Review Because it is Plainly Contrary to Precedent from this Court and the Purpose of Federal Rule of Civil Procedure 23

Throughout the entire administrative process, Lisanti pursued his claims on behalf of all similarly situated federal court reporters. Lisanti's request for class treatment was appropriate under the rules of the Merit Systems Protection Board, which provide that "one or more employees may file an appeal as representatives of a class of employees." 5 C.F.R. § 1201.27. Section (c) of that same regulation states that "in determining whether it is appropriate to treat an appeal as a class action, the judge will be guided but not controlled by the applicable provisions of the Federal Rules of Civil Procedure." 5 C.F.R. § 1201.27.

The putative class brought by Lisanti easily met the numerosity requirement of Federal Rule of Civil Procedure 23 ("Rule 23") because the potential class included over 100 federal court reporters nationwide, making joinder impracticable. *See* Fed. R. Civ. P. 23(a)(1); *see also Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (generally more than 40 class members is adequate). The Board, however, denied class treatment on the grounds that each potential class member had not exhausted his or her administrative remedies and therefore the numerosity requirement

had not been met. (App., *infra* D). The Federal Circuit chose not to review this holding because it determined that the issue was moot in view of its ruling on the merits. The Federal Circuit's failure to review the Board's class determination warrants review because the Board's holding frustrates the purpose of the class mechanism and is contrary to the principles enunciated by this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co., Inc., v. Parker*, 462 U.S. 345 (1983).

The principal purpose of a class action procedure is the promotion of efficiency and economy of litigation. *See Crown, Cork & Seal Co.*, 462 U.S. at 349. Accordingly, in *American Pipe* and *Crown, Cork & Seal Co.*, this Court held that a class action suspends the statutes of limitations for the members of the class until class certification is denied. *See id.* at 349; *American Pipe*, 414 U.S. at 554. This Court's holdings in *American Pipe* and *Crown Cork* are based on two principal determinations: first, the failure to suspend the statutes of limitations while a class is pending would lead to a multiplicity of lawsuits that Rule 23 seeks to prevent; and, second, the commencement of a class action provides notice to defendant of the claims being brought against it and the identity of potential claimants such that the policies underlying statutes of limitations are not contravened. *See American Pipe*, 414 U.S. at 555.

The Board's holding that members of the class must first exhaust administrative remedies at the OPM in order to be counted for purposes of determining numerosity frustrates the purpose of Rule 23 and finds no support in the law. As explained by this Court in

American Pipe, a class action "is no longer an invitation to joinder, but a truly representative suit designed to avoid, rather than encourage unnecessary filing of repetitious papers and motions." *Id.* at 550. And, as this Court has recognized, Rule 23 "both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal Co.*, 462 U.S. at 352-53. Indeed, "[r]ule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit." *American Pipe*, 414 U.S. at 552.

Under the Board's holding, however, class members are not able to rely on the existence of Lisanti's class suit. Rather, to protect their rights class members are required to initiate their own individual procedures at the OPM. The Board's ruling thus encourages the filing of a multiplicity of identical administrative procedures, which is precisely the result that this Court's decisions in *American Pipe* and *Crown, Cork & Seal Co.* sought to curtail. *American Pipe*, 414 U.S. 538; *Crown, Cork & Seal Co.*, 462 U.S. 345 (1983).

The Federal Circuit's decision that rendered Board's class determination moot warrants review because the result is squarely at odds with the purpose behind the class action mechanism and this Court's pronunciations in *American Pipe* and *Crown, Cork & Seal Co. See generally American Pipe*, 414 U.S. 538 and *Crown, Cork & Seal Co.*, 462 U.S. 345.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MARY STOWELL
LINDA D. FRIEDMAN*
RAFAEL E. LÁZARO
STOWELL & FRIEDMAN, LTD.
321 South Plymouth Court
Suite 1400
Chicago, Illinois 60604
(312) 431-0888

* *Counsel of Record* *Counsel for Petitioner*

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED JULY 29, 2009

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-3261

ANTHONY W. LISANTI,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Petition for review of the Merit Systems Protection Board in CH0831070499-I-1

DECIDED: July 29, 2009

Before MICHEL, *Chief Judge*, and NEWMAN and LOURIE, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Anthony W. Lisanti appeals from the decision of the Merit Systems Protection Board ("Board") affirming the Office of Personnel Management's ("OPM's") calculation of his retirement annuity. *See Lisanti v. Office of Pers. Mgmt.*, No. CH-0831-07-0499-I1, 2007 MSPB Lexis 7731

(M.S.P.B. Nov. 19, 2007) ("*Initial Decision*"); *Lisanti v. Office of Pers. Mgmt.*, No. CH-0831-07-0499-I-1, 2008 WL 1887129, 108 M.S.P.R. 604 (Apr. 4, 2008) ("Final Order"). As set forth below, while we disagree with the Board's ruling that it lacked authority to decide the case, because the Board did affirm OPM's correct determination of Lisanti's base pay and therefore his annuity, we affirm the Board's decision.

BACKGROUND

Lisanti worked as a court reporter in the federal court system from October 1970 until February 2006, when he retired from federal service. His retirement benefits were provided by the federal government under the Civil Service Retirement System ("CSRS"). In this appeal, Lisanti argues that those benefits were incorrectly calculated because they were based on only part of his income.

As a court reporter, Lisanti had two primary duties to which his pay was separately allotted: recording judicial proceedings and producing transcripts upon request to the courts and the parties. Producing transcripts required transcribing the recorded proceedings. Lisanti spent approximately two hours transcribing proceedings to produce the transcripts for every hour he spent recording them.

In 1984, the federal government changed the pay structure for court reporters. Before 1984, court reporters were primarily independent contractors who

negotiated their own rates for producing transcripts and engaged in freelance reporting work apart from their official work for the courts. Their salaries were set artificially low due to their ability to engage in outside work. After 1984, court reporters were treated as full-time government employees with benefits and were paid for recording proceedings and producing transcripts for the court with a larger annual salary fixed by the Judicial Conference. *See* 28 U.S.C. § 753(e); *see also Cutright v. United States*, 953 F.2d 619 (Fed. Cir. 1992) (holding court reporters to be full-time government employees after 1984). They were, however, paid for producing transcripts for the parties by "charg[ing] and collect[ing] fees [from the parties] for transcripts . . . , at rates prescribed by the court subject to the approval of the Judicial Conference." 28 U.S.C. § 753(f). Thus, while receiving a larger fixed salary from the court system, the court reporters derived some of their income from direct payments from the parties.

During Lisanti's employment, his employing agency, the Administrative Office of the United States Courts, reported his income to the Internal Revenue Service ("IRS"). The Administrative Office reported Lisanti's annual salary on a W-2 form. It reported Lisanti's transcript income on a 1099 form as self-employment income. Lisanti challenged the tax treatment of his transcript income at the IRS, which granted him a refund for the employer's share of the payroll taxes he had paid. In other words, the IRS apparently treated Lisanti's transcript income as income from work performed as an employee of the United States, not as self-employment income.

Appendix A

Under the CSRS, both Lisanti and the Administrative Office made periodic contributions to the Civil Service Retirement and Disability Fund ("CSRS fund"), calculated using Lisanti's "basic pay," or "base pay." *See* 5 U.S.C. § 8334(a)(1)(A), (B) (instructing the employing agency to contribute a certain percentage of its employees' "basic pay" and to deduct the same amount from the employees' pay to contribute both to the "Fund," defined in 5 U.S.C. § 8331(5) as the CSRS fund). "Basic pay" is defined in 5 U.S.C. § 8331(3) to include several types of pay, specified in subsections (A) through (H), such as "additional pay" and "premium pay" provided by certain specified provisions of law. *Id.* After subsection (H), the statute provides that "basic pay" "does not include bonuses, allowances, overtime pay, military pay, [or] pay given in addition to the base pay of the position as fixed by law or regulation except as provided by subparagraphs (B) through (H) of this paragraph." *Id.*

Under OPM's regulations, the "[r]ate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including any . . . special rate supplement under 5 CFR part 530, subpart C [Special Rate Schedules for Recruitment and Retention]; or similar payment or supplement under other legal authority, . . . exclusive of additional pay of any other kind." 5 C.F.R. § 550.103. The Administrative Office used Lisanti's annual salary, which did not include his income from preparing transcripts, as his basic pay for purposes of his CSRS fund contributions.

Appendix A

When an employee retires, OPM calculates retirement annuities, also based on the employee's basic pay. *See* 5 U.S.C. § 8339(a) (providing that the annuity of an employee is a multiple of his "average pay"); 5 U.S.C. § 8331(4) (defining "average pay" as an average of an employee's "basic pay" over certain years).

In 1996, in anticipation of his retirement several years later, Lisanti, along with nine other court reporters, sued the Administrative Office in the United States District Court for the Northern District of Illinois, claiming that the income he had earned from the preparation of transcripts had been unlawfully excluded from the calculation of his pension benefits. *1337 *Lisanti v. United States*, No. 96-C-00395, 1998 WL 111574, 1998 U.S. Dist. Lexis 2934 (N.D.Ill. Mar. 10, 1998) ("*Lisanti District Court Dismissal*"). The district court dismissed Lisanti's claim for lack of subject matter jurisdiction, holding that the CSRS provided for an exclusive review process for claims relating to retirement benefits; that review process consisted of adjudication by OPM, an appeal to the Board, and a petition for review in this court. *Id.*, 1998 WL 111574 at *2-5, 1998 U.S. Dist. Lexis 2934 at *9-16. At the same time, Lisanti and the other court reporters raised their claim with OPM and appealed to the Board, which issued a decision determining that it lacked jurisdiction because none of the court reporters had retired and applied for retirement benefits. *Id.*, at *2-3, 1998 U.S. Dist. Lexis 2934, at *10-11.

When Lisanti retired in 2006, he began receiving pension benefits from the CSRS in the form of a retirement annuity. In calculating his annuity, OPM again used Lisanti's annual salary as his basic pay and again did not include in his basic pay the income he had received for the preparation of court transcripts. Lisanti again challenged OPM's calculation. In an initial decision, OPM determined that it had correctly calculated Lisanti's annuity, as it had used his salary, which was certified by his payroll agency, the Administrative Office, as his basic pay. OPM also determined that it had no authority to include Lisanti's transcript income in his basic pay because the transcript income did not fall under the allowable "base pay" as defined by 5 U.S.C. § 8331(3). In a reconsideration decision, OPM upheld its initial decision, stating that Lisanti's "transcript income cannot be included in [his] average salary computation because there is no provision in the law for including it." OPM Priv. Ltr. Rul. CSA 4 305 492 (May 15, 2007), Joint App. 16.

Lisanti appealed OPM's decision to the Board and moved to certify the appeal as a class action on behalf of himself and all other court reporters similarly situated to him. First, the administrative judge ("AJ") denied Lisanti's motion to certify the appeal as a class action, reasoning that Lisanti had not proven that the Board had jurisdiction over other members of the class because he had not shown that they had exhausted their administrative remedies at OPM and declining to waive the exhaustion requirement for the other members of the class.

The AJ then stated that the Board lacked authority to decide the case, but nevertheless affirmed OPM's decision. The AJ reasoned that OPM's rules require that the employing agency (in this case, the Administrative Office), not OPM, determine an employee's basic pay. Here, the Administrative Office had certified Lisanti's basic pay in his individual retirement record, and it did not include his transcript income. The AJ acknowledged that the IRS's treatment of Lisanti's transcript income conflicted with the Administrative Office's exclusion of it from "basic pay," finding Lisanti's arguments "compelling." *Initial Decision*, 2007 MSPB Lexis 7731, at *8. However, according to the AJ, OPM was compelled to rely on the Administrative Office's certified individual retirement record. Thus, the AJ found that Lisanti was required to seek redress from the Administrative Office, not from the Board. However, despite the conclusion that it lacked authority to review OPM's reliance on the Administrative Office's determination, the AJ affirmed OPM's decision.

Lisanti then petitioned for review of the AJ's decision. In a final order issued on April 4, 2008, the Board denied the petition, concluding that there was no new, previously unavailable evidence and that the AJ made no error in law or regulation that affected the outcome. The AJ's initial decision therefore became the final decision of the Board.

Lisanti timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

Appendix A

DISCUSSION

The scope of our review in an appeal from a Board decision is limited. We can set aside the Board's decision only if it was "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2006); *see Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1311 (Fed. Cir. 2003).

A. *The Board Had the Authority to Address Lisanti's Basic Pay*

Lisanti argues that the Board committed several errors of law in affirming OPM's determination of his basic pay. According to Lisanti, the Board erred in holding that OPM had no authority to determine Lisanti's basic pay, and thus that the Board had no authority to review OPM's reliance on the Administrative Office's determination. Lisanti argues that the Board had the authority to order OPM to include transcript income in his basic pay, as the Board was required to review OPM's interpretation of a statute. Further, according to Lisanti, OPM was required to adjudicate all claims for CSRS annuity benefits; sending court reporters to the Administrative Office to have it determine their basic pay made the Administrative Office the adjudicator, in violation of the congressional mandate.

Additionally, according to Lisanti, the Board's decision leaves him no forum for review, as he has already sued the Administrative Office in district court, and the suit was dismissed for lack of jurisdiction, the district court stating that Lisanti was required to bring a claim at OPM. Lisanti further argues that the Administrative Office has no procedure for resolving his claim. Thus, Lisanti argues, the Board had the authority and the obligation to determine his basic pay, rather than forcing OPM to rely on the Administrative Office's determination.

The government responds that the Board properly held that it lacked the authority to review OPM's reliance on the Administrative Office decision. According to the government, for OPM to adjudicate claims under the CSRS, the employing agency must supply a certified individual retirement record, and that is the basic record for action on all claims for annuity; the Board must rely on the agency's records unless they are lost, destroyed, or incomplete. The government adds that numerous Board decisions hold that the Board lacks jurisdiction to order OPM to obtain a corrected certificate or to review an employing agency's certificate, and the Federal Circuit has deferred to those decisions.

The government further responds that Lisanti has not been deprived of review of his claim. The government argues that OPM may, within its jurisdiction, interpret the meaning of the term "basic pay" to identify whether transcript fees fall within the definition, which OPM did in this case. Although,

according to the government, OPM was not required to and could not recalculate Lisanti's annuity, Lisanti was not deprived of review. The government adds that, even if Lisanti had been deprived of review of his claim, the Board has limited jurisdiction and cannot be forced to provide relief when it is not within the Board's jurisdiction.

We agree with Lisanti that OPM had the authority to determine Lisanti's basic pay and that the Board also had the authority to review OPM's reliance on the Administrative Office's determination. Although the employing agency, the Administrative Office in this case, must certify an employee's basic pay in his individual retirement record, OPM is required under the CSRS to review the employing agency's legal determination of which categories of income qualify as basic pay. Congress designed the CSRS "to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system." *United States v. Fausto*, 484 U.S. 439, 444 (1988) (quoting S.Rep. No. 95-969, at 3 (1978), U.S.Code Cong. & Admin.News 1978, pp. 2723, 2725). Congress therefore mandated that CSRS claims be brought through one central channel instead of through various complicated avenues. *Id.* at 445 (The Civil Service Retirement Act "replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration."

(citing S.Rep. No. 95-969, at 4, U.S.Code Cong. & Admin.News 1978, at p. 2726)). Thus, under 5 U.S.C. § 8347(b), OPM "shall adjudicate all claims under" the CSRS. Such claims require the interpretation of the term "basic pay," which falls under the CSRS. *See* 5 U.S.C. § 8331(3) (defining "basic pay" under the CSRS). OPM was therefore required to review the Administrative Office's interpretation of the term "basic pay," which excluded transcript income from Lisanti's basic pay. The Board was similarly required to review OPM's interpretation of "basic pay," as Congress directed that OPM's actions that affect "the rights or interests of an individual" may be appealed to the Board. 5 U.S.C. § 8347(d)(1).

The Board's determination that Lisanti must only seek redress from the Administrative Office, if affirmed, would have effectively left Lisanti without any judicial remedy. As Lisanti points out, he attempted to force the Administrative Office to reevaluate his "basic pay" by suing the Administrative Office in federal district court. However, his case was dismissed, pursuant to the Administrative Office's motion, for lack of subject matter jurisdiction because the OPM-Board-Federal Circuit review process was the exclusive avenue for Lisanti to pursue his claims. *Lisanti District Court Dismissal*, 1998 U.S. Dist. Lexis 2934 at *9-16. Thus, Lisanti has tried to "seek redress from his employing agency," and he had no judicial remedy there. Initial *Decision*, 2007 MSPB Lexis 7731, at *8. A result that forces Lisanti to bounce back and forth between OPM and the Administrative Office, with neither agency deciding his

claim, would be undesirable and should be avoided. *See Wassenaar v. Office of Pers. Mgmt.*, 21 F.3d 1090, 1092 (Fed. Cir. 1994) ("A reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and legislative purpose." (quotation marks omitted)). Instead, the more reasonable and logical result is that OPM and eventually the Board have, as designated by Congress, the responsibility to interpret the law to adjudicate Lisanti's claims.

The government cites several Board decisions and two of our nonprecedential decisions, *Rainone v. Office of Pers. Mgmt.*, 249 Fed.Appx. 823 (Fed. Cir. 2007), and *Lee v. Office of Pers. Mgmt.*, 301 Fed. Appx. 926 (Fed. Cir. 2008), to argue that an employing agency's certified individual retirement record is binding on OPM and on the Board, so that OPM may not consider evidence outside of the certified*1340 individual retirement record. Gov't Br. 14-17. However, the government fails to cite any precedential decision of this court supporting the idea that OPM may avoid interpreting the CSRS, a statute that OPM itself is required to administer. *See* 5 U.S.C. § 8347(a) ("[OPM] shall administer this subchapter [the CSRS]."). Thus, even when an employee's certified individual retirement record states his "basic pay," if the employee challenges the employing agency's interpretation of the term "basic pay," OPM, and subsequently the Board, are required to entertain that claim, absent some clear congressional intent to the contrary. *Cf. Bacani v. Office of Pers. Mgmt.*, 64 M.S.P.R. 588, 592 (1994) (determining that the Board

could not interpret employee's "special pay adjustment" because such an adjustment, under the employing agency's statute "may not be reviewed by any other agency." (citing 38 U.S.C. § 7422(d))). The Board therefore erred in stating that neither it nor OPM had the authority to question the Administrative Office's determination of Lisanti's basic pay.

We next address OPM's decision that transcript income did not fall under the allowable basic pay as defined by 5 U.S.C. § 8331(3). We may address the correct interpretation of 5 U.S.C. § 8331(3), as it is a matter of law that OPM, the agency responsible for determining basic pay, decided in the first instance, even though the Board's decision did not rely on OPM's interpretation of it. *See generally Killip v. Office of Pers. Mgmt.*, 991 F.2d 1564, 1568-69 (Fed. Cir. 1993) ("We may, . . . where appropriate, affirm the Board on grounds other than those relied upon in rendering its decision, when upholding the Board's decision does not depend upon making a determination of fact not previously made by the Board.").

B. *Transcript Income Is Not Basic Pay*

On the merits, Lisanti argues that his pay for preparing transcripts should be part of his basic pay and that OPM erred in holding that it was not. According to Lisanti, under 5 U.S.C. § 8331(3) and 5 C.F.R. § 550.103, "basic pay" includes the pay federal employees receive for performing their basic, required duties. Lisanti asserts that preparing transcripts takes up most

of a court reporter's time and is one of two basic tasks of a court reporter, so it is part of his basic, required duties. Basic pay is defined in the statute and regulations as pay "fixed by law or administrative action," and, according to Lisanti, reporters' fees for preparing transcripts are so fixed; reporters are given maximum rates they can charge for transcripts. Lisanti asserts that court reporters are unlawfully characterized as federal employees while recording proceedings but as independent contractors while preparing transcripts. According to Lisanti, the IRS recognized that the distinction was unlawful by refusing to treat Lisanti as an independent contractor for any of his income. Similarly, Lisanti points out that the Third Circuit has held in *United States v. Pittsburgh*, 757 F.2d 43, 47 (3d Cir. 1985), that court reporters are employees of the United States throughout performance of all of their duties. Thus, according to Lisanti, OPM and the Board should have found his income for preparing transcripts to be part of his basic pay.

The government responds that transcript income should not be included in the definition of "basic pay" because nothing in the statute provides for inclusion of transcript income in that definition. According to the government, the CSRS provides an extensive definition of "basic pay," which excludes overtime pay, bonuses, and "pay given in addition to the base pay of the position as fixed by law or regulation." Thus, the government asserts, "basic pay" is not necessarily the pay actually received. Although Lisanti may not charge more than a certain maximum for a transcript, the government

argues that Lisanti may choose to charge less, so his fees are not "fixed by law." Further, the government does not control how many transcripts Lisanti sells to private parties, so, according to the government, Lisanti's overall transcript income is not "fixed by law." Finally, the government argues that Lisanti's treatment for tax purposes is irrelevant to the statute's requirements. Instead, according to the government, the CSRS is funded by employee and agency contributions, which are calculated based only on the employee's "basic pay." Thus, the government argues, OPM does not have the funds to pay an employee an annuity based on more than what the agency considered his "basic pay."

We agree with the government that Congress's definition of the term "basic pay" does not include transcript income. In 5 U.S.C. § 8331(3), Congress defined "basic pay" both by inclusion and by exclusion. The term includes the various types of pay, all given by the government, set out in subsections (A) through (H), and it excludes "bonuses, . . . overtime pay, . . . [and] pay given in addition to the base pay of the position as fixed by law or regulation except as provided by subparagraphs (B) through (H) of this paragraph." *Id.*; *see* 5 C.F.R. § 550.103. Even though 28 U.S.C. § 753(f) sets out the scheme for the maximum amount that a court reporter can charge for transcripts, it is not pay "of the position fixed by law or regulation," as "base pay" is defined. *See* 5 U.S.C. § 8331(3); 5 C.F.R. § 550.103. As the government points out, no statute or regulation fixes the number of transcript orders a court reporter might

receive, so his pay for transcript orders is not the kind of pay "fixed by law" that was intended in 5 U.S.C. § 8331(3). Instead, the court reporter takes as many or as few transcript orders as the parties request and receives compensation accordingly, from those parties. Thus, the Administrative Office does not determine or control how much money a court reporter will earn from transcript orders, and the Administrative Office does not pay that money.*

Instead, transcript fees are more like bonuses or overtime pay: the more transcripts a court reporter produces for private parties, the more money he makes. Court reporters' annual salaries compensate them for forty hours of work per week, regardless how those hours are spent, and court reporters then receive transcript income on top of their annual salaries. Even though an employee's hourly rate of overtime pay will also be fixed by law, "overtime pay" is clearly excepted from basic pay under 5 U.S.C. § 8331(3). Similarly,

---

* When the United States is a party, it pays the court reporter's transcript fees. 28 U.S.C. § 753(f). The United States also pays for transcripts in criminal proceedings under the Criminal Justice Act (18 U.S.C. § 3006A) and in cases in which a party is proceeding *in forma pauperis*, from moneys appropriated for those purposes. 28 U.S.C. § 753(f). However, in those cases, the government is either acting as a party or standing in the shoes of a party for purposes of expenses, and the expenses are paid from an entirely different fund than the source of the court reporter's annual salary. Thus, the government's payment of those funds does not affect our analysis with respect to government control over Lisanti's pay.

transcript fees are not included in basic pay, even though the maximum amount per transcript is fixed by law.

Furthermore, 5 C.F.R. § 550.103 does not affect the outcome of this case. That regulation similarly defines "basic pay" as "pay fixed by law or administrative action for the position held by an employee, including any . . . special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority, . . . and exclusive of additional pay of any other kind." 5 C.F.R. § 550.103. The "purpose" of the "special rate supplement" is to establish "special rates of pay . . . to address significant recruitment or retention problems." 5 C.F.R. § 530.301. Lisanti does not argue that he is such a "special rate employee." *Id.* His transcript income also does not qualify as a "similar payment or supplement under other legal authority." 5 C.F.R. § 550.103. The transcript income was not established as a separate source of income to recruit or retain court reporters; rather, it was set up under the peculiar circumstances of the court reporters' history, when they shifted from being primarily independent contractors to being full-time federal employees. Furthermore, transcript income cannot be "similar" to a "special rate supplement" because, as explained *supra*, transcript income is more similar to overtime pay, which is explicitly excluded from the definition of "basic pay."

Additionally, as the government points out, Lisanti did not have any CSRS deductions taken out of his transcript income to help pay for his retirement annuity.

Although failure to make contributions is not determinative, as Lisanti and the Administrative Office could both perhaps retroactively add to the CSRS fund, Lisanti cannot argue that he has been treated inequitably within the statutory scheme, given that the same definition of "basic pay" was applied to both his contributions to the CSRS fund and his later retirement annuity.

Finally, although the treatment of Lisanti's transcript pay by the IRS may show that the transcript pay is part of his earned income, the income categories defined by the Internal Revenue Code are not relevant to the statutory definition of "basic pay." Instead, Congress defined "basic pay" separately for purposes of the CSRS, so Lisanti's attempts to show an inconsistency are unavailing. Absent statutory authorization for the inclusion of a certain type of income in "basic pay," we cannot order its inclusion, even if the result may seem unfair to Lisanti. *See Kindall v. Office of Pers. Mgmt.*, 347 F.3d 930, 934 (Fed. Cir. 2003) ("Article I, § 9, cl. 7 of the Constitution limits payments from the Treasury to those authorized by statute, and, without statutory provision for inclusion of intervening cost-of-living adjustments at reinstatement, this court cannot order such inclusion. Although the result seems unfair to Mrs. Kindall, it is the role of Congress, not the courts, to rectify the problem," if one exists. (citation omitted)). Thus, the IRS's treatment of Lisanti's income is not relevant to OPM's treatment of his income.

C. *Lisanti's Request for Class Treatment is Moot*

Lisanti finally argues that the Board abused its discretion in holding that this case did not meet the requirements for class treatment. However, because we have affirmed the Board's decision that Lisanti's transcript income did not qualify as "basic pay," his request for class treatment is moot. *See Ferreiro v. United States*, 501 F.3d 1349, 1353 (Fed. Cir. 2007) ("Our decision [affirming dismissal of the case] moots appellant's appeal of the trial court's denial of class certification."); *Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1337-38 (Fed. Cir. 2004) ("[T]he appellants' class certification issue is moot in light of our holding[ ] that the government is not liable to the appellants . . . ." (quotation marks omitted)). We have considered Lisanti's remaining arguments and find them unpersuasive.

CONCLUSION

In sum, we disagree with the Board's determination that it did not have the authority to review OPM's reliance on the employing agency's individual retirement record. However, the Board properly affirmed OPM's decision interpreting Lisanti's "basic pay." We therefore affirm the Board's decision in favor of the government.

AFFIRMED

APPENDIX B — FINAL ORDER OF THE MERIT SYSTEMS PROTECTION BOARD ("BOARD") AFFIRMING THE OFFICE OF PERSONNEL MANAGEMENT'S ("OPM'S") DETERMINATION DATED APRIL 4, 2008

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
CH-0831-07-0499-I-1

DATE: April 4, 2008

ANTHONY W. LISANTI,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Agency.

(CSA 4 305 492)

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

Appendix B

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

FOR THE BOARD: William D. Spencer
Clerk of the Board

Washington, D.C.

APPENDIX C — INITIAL DECISION OF THE BOARD DATED NOVEMBER 19, 2007

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

DOCKET NUMBER
CH-0831-07-0499-I-1

DATE: November 19, 2007

ANTHONY W. LISANTI,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Agency.

(CSA 4 305 492)

BEFORE
Kasandra C. Robinson
Administrative Judge

Appendix C

INITIAL DECISION

INTRODUCTION

Anthony W. Lisanti filed a timely appeal with the Board from a May 15, 2007, reconsideration decision of the Office of Personnel Management (OPM) in which it denied his request to recalculate his retirement annuity under the Civil Service Retirement System (CSRS). The Board has jurisdiction over this appeal pursuant to 5 U.S.C.A. §§ 7701(a), 8347(d)(1) (West 2007) and 5 C.F.R. § 831.110 (2007). I conducted a telephonic hearing in this matter on November 15, 2007.

For the reasons further discussed below, OPM's reconsideration decision is AFFIRMED.

BACKGROUND

The appellant retired from federal service on February 1, 2006, following 36 years of service as a Court Reporter under CSRS. The appellant began receiving pension benefits on February 2, 2006, and contends that OPM incorrectly calculated his annuity because it did not include the income he received for the preparation of court transcripts. In an initial decision, OPM determined that the appellant's annuity was correctly calculated as it was computed using his high-3 average salary, which was certified by his payroll agency, the Administrative Office of the United States Courts (AOUSC). *See* Initial Appeal File (IAF), Tab 6, Subtab 2C. OPM further determined that it has no authority to

use transcript income in the computation of the appellant's benefits because it does not fall under the allowable base pay as defined by 5 U.S.C.A. § 8331(3). *See id.* In a reconsideration decision dated May 15, 2007, OPM upheld its initial decision. *See* IAF, Tab 6, Subtab 2A. The instant appeal followed. *See* IAF, Tab 1.

ANALYSIS AND FINDINGS

In an appeal from an OPM reconsideration decision, the appellant bears the burden of proof by preponderant evidence.[1] The annuity of a retiring employee is 1 ½ percent of his average pay multiplied by so much of his total service as does not exceed 5 years; plus 1 ¾ percent of his average pay multiplied by so much of his total service as exceeds 5 years but does not exceed 10 years plus 2 percent of his average pay multiplied by so much of his total service as exceeds 10 years. *See* 5 U.S.C.A. § 8339(a) (West 2007).

The statute defines "basic pay" as the amount a Member received from April 1, 1954, to February 28, 1955, as expense allowance under section 601(b) of the Legislative Reorganization Act of 1946 (60 Stat. 850), as amended; and that amount from January 3, 1953, to March 31, 1954, if deposit is made therefore as provided by section 8334 of this title; additional pay provided by

1. A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than not. 5 C.F.R. § 1201.56(c)(2) (2007).

— subsection (a) of section 60e-7 of title 2 and the provisions of law referred to by that subsection; and sections 60e-8, 60e-9, 60e-10, 60e-11, 60e-12, 60e-13, and 60e-14 of title 2; premium pay under section 5545(c)(1) of this title; with respect to a law enforcement officer, premium pay under section 5545(c)(2) of this title; and with respect to a customs officer (referred to in subsection (e)(1) of section 5 of the Act of February 13, 1911), compensation for overtime inspectional services provided for under subsection (a) of such section 5, but not to exceed 50 percent of any statutory maximum in overtime pay for customs officers which is in effect for the year involved; but does not include bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation except as provided by subparagraphs (B), (C), (D), and (E) of this paragraph retroactive pay under section 5344 of this title in the case of a retired or deceased employee, uniform allowances under section 5901 of this title, or lump-sum leave payments under subchapter VI of chapter 55 of this title. For an employee paid on a fee basis, the maximum amount of basic pay which may be used is $10,000. *See* 5 U.S.C.A. § 8331(3) (West 2007).

According to OPM's CSRS and FERS Handbook for Personnel and Payroll Offices, "basic pay" is the rate of pay fixed by applicable law or regulation for a position. *See* OPM, The CSRS and FERS Handbook for Personnel and Payroll Offices, § 50A2.1-5 (Apr., 1998). It is the employing agency, not OPM, which determines an employee's "basic pay" by withholding retirement

deductions from the employee's pay; thus, the Board's review in such matters is limited to determining that OPM, in computing the amount of the individual's retirement annuity, properly relied on the employing agency's certification or noncertification in the employee's individual retirement record (IRR) of the employee's rate of "basic pay." *See Maxwell v. Office of Personnel Management*, 78 M.S.P.R. 350, 356 (1998). Bonuses, allowances, overtime pay, military pay, and pay given in addition to base pay are specifically excluded from "basic pay." *See id.* at 356; *see also* OPM, The CSRS and FERS Handbook for Personnel and Payroll Offices, § 30A1.1-2 (Apr., 1998). "Average pay" is defined as the largest annual rate resulting from averaging an employee's rates of basic pay in effect over any 3 consecutive years of creditable service. *See* 5 U.S.C.A. § 8331(4) (West 2007).

According to OPM's reconsideration decision, it calculated the appellant's retirement annuity by using his average salary rates during the highest 3 consecutive years of his earnings. *See* IAF, Tab 5, Subtab2A. OPM determined that the appellant's high three salary was $70,068.00. *See id.* This calculation was based on the appellant's IRR furnished and certified by his employing agency, AOUSC. *See id.; see also* IAF, Tab 5, Subtab 2D.

As stated above, it is the appellant's contention that his retirement annuity was calculated incorrectly because it did not include the money he earned in the preparation of transcripts for official proceedings

(transcript income). The appellant raises several arguments in support of his contention. Among other things, the appellant argues that, in 1984, he became a full-time employee of AOUSC. *See* Hearing Tape (HT), Side A. Prior to that time, he was considered a contract employee. *See id.* As a contract employee, transcript income was considered in his total salary calculation, and reported by his employing agency to the Internal Revenue Service (IRS) on a form 1099. *See id.* After he became a full-time employee, his salary did not include transcript income on his W-2 form, rather, the agency reported this income to the IRS on a form 1099. *See id.* Because this income was reported on a form 1099, the agency did not withhold taxes, and the appellant was required to pay taxes on this income independently. *See id.* The appellant, however, subsequently challenged the IRS on this requirement, and the IRS later refunded his tax payments. *See id.*

Despite the appellant's contention, however, I find the Board lacks the authority to review OPM's reliance on AOUSC's certified IRR. As discussed above, it is the employing agency, not OPM, which determines an individual's "basic pay," which it certifies in the individual's IRR forwarded to OPM. It is undisputed that AOUSC provided OPM with a certified "Final" IRR dated February 23, 2006, that did not include transcript income. *See* IAF, Tab 5, Subtab 2D. There is no evidence that AOUSC subsequently amended or corrected this "Final" IRR to show that transcript income should have been included in the appellant's "basic pay." In the absence of such a corrected or amended IRR, I find that

Appendix C

OPM properly relied on AOUSC's certified "Final" IRR when it computed the amount of the appellant's CSRS retirement annuity.

The appellant has raised several compelling arguments to support his contention that his transcript income should have been included in his salary. However, the appellant must seek redress from his employing agency, AOUSC, and seek an amended or corrected IRR before OPM can properly adjust his CSRS annuity. Therefore, because the Board lacks the authority to review OPM's reliance upon an employing agency's certified IRR, I must AFFIRM OPM's reconsideration decision. *See Bacani v. Office of Personnel Management*, 64 M.S.P.R. 588, 592-94 (1994) (neither OPM nor the Board could consider an annuitant's claim that the IRR maintained and certified by his employing agency erroneously excluded special pay from the computation of his retirement annuity); *Werley v. Office of Personnel Management*, 39 M.S.P.R. 686, 691-92 (1989) (in a retirement appeal concerning whether certain contract service is creditable service for retirement purposes, the Board's review is limited to determining that, in making its decision, OPM properly relied upon the employing agency's certification or noncertification of the contract service claimed by the annuitant); *Dickson v. Office of Personnel Management*, 37 M.S.P.R. 465, 468-70 (1988) (OPM properly relied on the Department of Defense's certification in calculating the annuitant's retirement annuity because the Board lacks jurisdiction to review such certifications).

Appendix C

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: Kasandra C. Robinson
Administrative Judge

APPENDIX D — DECISION OF THE BOARD DENYING CLASS CERTIFICATION DATED JULY 19, 2007

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

DOCKET NUMBER
CH-0831-07-0499-I-1

DATE: July 19, 2007

ANTHONY W. LISANTI,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Agency.

(CSA 4 305 492)

RESPONSE TO APPELLANT'S MOTION TO CERTIFY THIS APPEAL AS A CLASS ACTION

On July 12, 2007, the appellant filed a motion to classify this appeal as a class action. As a basis for the motion, the appellant states "we wish to proceed with Mr. Anthony Lisanti's appeal to the Merit Systems Protection Board ("MSPB") on behalf of Mr. Lisanti, as well as all other Court Reporters similarly situated to him."

Appendix D

The Board's regulations provide that an administrative judge will hear a case as a class appeal "if he or she finds that a class appeal is the fairest and most efficient way to adjudicate the appeal . . ." *See* 5 C.F.R. § 1201.29(a) (2007). The regulations provide further that, in deciding whether to hear a case as a class appeal, the administrative judge will be guided by the applicable provisions of the Federal Rules of Civil Procedure. *See* 5 C.F.R. § 1201.27(c) (2007).

One of the requirements that must be satisfied before an action may be brought as a class action under Rule 23 of the Federal Rules of Civil Procedure is that the putative class be so numerous that joinder of all members is impracticable. Fed.R.Civ.P. 23(a). Individuals excluded from the class because the adjudicator lacks jurisdiction over their claims are not counted for purposes of counting numerosity. *See Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975).

It is well settled that the Board has appellate jurisdiction over the Office of Personnel Management's (OPM's) determinations affecting rights or interests under the federal retirement system only after OPM has issued a final decision, that is, a reconsideration decision, concerning those rights or interests. *See Wassenarr v. Office of Personnel Management*, 55 M.S.P.R. 517, 520 (1992). The appellant in this appeal, however, has not asserted that other members of the putative class have exhausted administrative remedies and received a reconsideration decision from OPM. The appellant therefore has not met his burden of

establishing that the Board has jurisdiction over any of the putative class members other than himself. *See id.*

Without jurisdiction over absent putative class members, the adjudicator can certify a class that includes them only if it waives the exhaustion requirement with regard to them. *See Salfi*, 422 U.S. at 763-64; *Wassenarr*, 55 M.S.P.R. at 521. To determine whether waiver of the exhaustion requirement is appropriate with regard to the absent putative class members, the following must be considered: (1) The challenge of the legality of OPM's statutory interpretation is collateral to the claims for individual benefits; (2) the absent members of the putative class would be irreparably injured if the exhaustion requirement is enforced; and (3) exhaustion would be futile. *Wassenarr*, 55 M.S.P.R. at 521.

I find that, consistent with *Wassenarr*, there are policy concerns that would be furthered by enforcing the exhaustion requirement. First, adherence to the requirement shows appropriate deference to the regulatory decision that OPM and not the Board should serve as the initial forum for the resolution of retirement annuity issues; second, exhaustion shows respect for OPM's autonomy by allowing OPM to exercise its discretion, apply its special expertise, and correct its own errors; and third, the exhaustion requirement fosters judicial economy by permitting OPM to vindicate rights under its jurisdiction, thereby obviating Board intervention, and by encouraging OPM to make findings of fact on which the Board can later rely in its decision making. *See id.* at 522.

For the reasons discussed above, I decline to waive the exhaustion requirement with respect to the absent members of the putative class. Further, I have no reason to believe that absent putative class members who have exhausted their administrative remedies are so numerous that joinder is impracticable. *See* 5 C.F.R. § 1201.36 (2007). Accordingly, I DENY the appellant's request for class certification.

FOR THE BOARD:

Kasandra C. Robinson
Administrative Judge

APPENDIX E — THE FINAL DECISION OF THE OFFICE OF PERSONNEL MANAGEMENT ("OPM") DENYING RECONSIDERATION DATED MAY 15, 2007

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

May 15, 2007

Human Resources
Products and Services
Division

Anthony W. Lisanti
1855 N New England
Chicago, IL 60707

CSA 4 305 492

Dear Mr. Lisanti:

This is in reply to your request submitted by Stowell & Friedman, Ltd., Attorneys at Law, on your behalf for reconsideration of the initial decision of the Office of Personnel Management (OPM). This decision found that OPM has no authority to include transcript income in the computation of your annuity and that your civil service annuity was correctly computed under the Civil Service Retirement (CSR) law. For the reason(s) explained below, we affirm the initial decision.

Appendix E

BACKGROUND

According to the records, you retired voluntarily under the Civil Service Retirement Law on February 1, 2006. Your annuity was computed based on your total service and your basic salary rates as provided by your former employing agency. You allege that the salary used to compute your high-3 average salary should include transcript income. Initially, it was determined that your annuity was computed correctly based on your total service and the salary rates as provided by your former agency. You disagreed with our initial decision and requested reconsideration.

ANALYSIS AND FINDINGS

OPM is charged with the administration of the Civil Service Retirement law and is expected to pay benefits as provided by law. Also, we are obligated under law and regulation to correct any error(s) in payment of benefits. The law that applies in your case is as follows:

Section 8339 (a), title 5, United States Code, which provides in pertinent part:

> (a) Except as otherwise provided by this section, the annuity of an employee retiring under this subchapter is —
>
> (1) 1 1/2 percent of his average pay multiplied by so much of his total service as does not exceed 5 years; plus

(2) 1 3/4 percent of his average pay multiplied by so much of his total service as exceeds 5 years but does not exceed 10 years; plus

(3) 2 percent of his average pay multiplied by so much of his total service as exceeds 10 years (Emphasis Added).

Section 8331 (3) Title 5, United States Code reads:

(3) "basic pay" includes —

(B) additional pay provided by —

(i) subsection (a) of section 60e-7 of title 2 and the provisions of law referred to by that subsection; and

(ii) sections 60e-8, 60e-9, 60e-10, 60e-11, 60e-12, 60e-13, and 60e-14 of title 2;

(C) premium pay under section 5545 (c)(1) of this title;

(D) with respect to a law enforcement officer, premium pay under section 5545 (c)(2) of this title;

(E) availability pay —

(i) received by a criminal investigator under section 5545a of this title; or

(ii) received after September 11, 2001, by a Federal air marshall of the Department of Transportation, subject to all restrictions and earning limitations imposed on criminal investigators under section 5545a;

(F) pay as provided in section 5545(b)(2) and (c)2;

(G) with respect to a customs officer (referred to in subsection (e)(1) of section 5 of the Act of February 13, 1911), compensation for overtime inspectional services provided for under subsection (a) of such section 5, but not to exceed 50 percent of any statutory maximum in overtime pay for customs officers which is in effect for the year involved; and

(H) any amount received under section 5948 (relating to physicians comparability allowances); but does not include bonuses, allowances,

> overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation except as provided by subparagraphs (B) through (H) of this paragraph, retroactive pay under section 5344 of this title in the case of a retired or deceased employee, uniform allowances under section 5901 of this title in the case of a retired or deceased employee, uniform allowances under section 5901 of this title, or lump-sum leave payments under subchapter VI of chapter 55 of this title. For an employee paid on a fee basis, the maximum amount of basic pay which may used is $ 10,000;

We find that your transcript income cannot be included in your average salary computation because there is no provision in the law for including it.

Section 8331 (4) Title 5, United States Code reads:

> (4) "average pay" means the largest annual rate resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of creditable service . . . with each rate weighted by the time it was in effect . . .

Appendix E

Your average pay resulted from the average salary rates paid during the highest 3 consecutive years of earnings. The average salary used in computing your annuity was $70,068.00 and it was based on your full time employment. The law requires the computation of annuity be based on the average rates in effect during employment. When the Administrative Office Of The United States Courts prepared the estimated computation of your annuity, it was based on an assumed high-3 average salary of $70,017.00 and it was merely an estimate. An estimate does not represent the final annuity computation. When your annuity was finalized by OPM, it was computed based on your high-3 average salary of $70,068.00 and your total years of service of 38 years. For your information enclosed is a "Computation of your Annuity" and an Average Salary Computation to show how your high-3 average salary was computed. The law requires the computation of annuity to be based on the average pay rates in effect during employment. OPM has no authority to include "transcript income" in the computation of your annuity because it does not fall under the allowable base pay as defined in 5 USC 8331(3).

Per your request enclosed are copies of our Individual Retirement Records, Standard Form 2806's.

The average salary was correctly computed based on the information furnished by your former agency, and you are receiving the maximum annuity authorized by law.

The initial decision is affirmed.

Appendix E

APPEAL RIGHTS

This constitutes the final decision of OPM. You have the right to appeal to MSPB. We are enclosing a package that contains 1) MSPB regulations, 2) MSPB office locations, and 3) an MSPB application form providing filing instructions. Please note that an appeal must be filed within 30 calendar days after the date of this decision, or 30 days after receipt of this decision, whichever is later.

Sincerely,

Monique V. Proctor
Legal Administrative Specialist
Disability, Reconsideration and Appeals Group

Enclosures

APPENDIX F — THE INITIAL DECISION OF THE OPM DATED SEPTEMBER 26, 2006

United States
Office of
Personnel Management
Washington, DC 20415-0001

September 26, 2006

J. Bryan Wood
Stowell & Friedman, Ltd.
Attorneys at Law
3210 South Plymouth Court, suite 1400
Chicago, IL 60604

Dear Mr. Wood:

This is in reply to your August 9, 2006, letter on the behalf of Mr. Anthony W. Lisanti, regarding the computation of his average salary.

We cannot disclose information to you concerning Mr. Anthony W. Lisanti's civil service retirement benefits until you provide us with written authorization from him stating we may do so.

By law, Mr. Lisanti's average salary was computed based on the largest annual rate resulting from averaging his rates of basic pay in effect over any period of 3 consecutive years of creditable service, with each rate weighted by the length of time it was in effect. The average salary rates were certified by his payroll agency,

the Administrative Office of the United States Courts. Our adjudication of his average salary is based solely on the records certified by his agency.

We have no authority to use "transcript income" in the computation of Mr. Lisanti's benefits because it does not fall under the allowable base pay as defined in 5 USC 8331(3).

If Mr. Lisanti is disputing the computation of his average salary, he may request reconsideration. We have enclosed **Information and Instructions on Your Reconsideration Rights** (form RI 38-47), which explains how to file his request. Please note that his request for reconsideration must be filed within 30 days of the date of this letter. After receipt of his request for reconsideration, OPM will issue a final decision in this matter. If he disagree with OPM's final decision, he can appeal to the Merit Systems Protection Board (MSPB). He may appeal to the MSPB only after OPM has issued a final decision.

Sincerely,

s/ Tanya Battle
Tanya Battle
Legal Administrative Specialist
Claims 1 Group, Post-Retirement Branch

Enclosure

APPENDIX G — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DISMISSING COURT REPORTER'S CLAIMS FOR LACK OF JURISDICTION DATED MARCH 9, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 96 C 0395

Judge Richard A. Posner*

ANTHONY LISANTI, JESSE ANDREWS, WANDA BARNES, LAURA BRENNAN, JAMES CHEEK, MARY GALLAGHER, JOENE HANHARDT, VALERIE HARRIS, LOIS LA CORTE, and ROSEMARY SCARPELLI, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, and L. RALPH MECHAM, Director of the Administrative Office of the United States Courts, both individually and officially,

Defendants.

---

* Chief Judge, United States Court of Appeals for the Seventh Circuit, sitting in the district court by designation.

Appendix G

MEMORANDUM OPINION

The ten named court reporters employed by the United States District Court for the Northern District of Illinois, filed a second amended complaint against the Government alleging that their constitutional rights to due process and equal protection were violated by the method used to calculate their pension benefits and determine their salary increases.[1] The Government filed a motion to dismiss on the grounds of lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), and, alternatively, failure to state a claim. Fed. R. Civ. P. 12(b)(6). The parties have fully briefed this motion. The government's motion to dismiss Plaintiffs' constitutional claims relating to the calculation of pension benefits is dismissed for lack of subject matter jurisdiction, and the Government's motion to dismiss Plaintiffs' equal protection claim relating to salary raises is denied.

I. FACTS

At issue in this case are the methods used to calculate the court reporters' pension benefits and their salary. By federal statute, court reporters receive two

---

1. Plaintiffs' complaint also included a claim for breach of contract, pursuant to 28 U.S.C. § 1346(a)(2) (known as the Little Tucker Act), but they subsequently voluntarily dismissed this claim in their Memorandum in Opposition to Defendants' Motion to Dismiss. (Memorandum in Opposition to Defendants' Motion to Dismiss, 2-3 n.1, 9.) Additionally, plaintiffs voluntarily dismissed their claim against L. Ralph Mecham in his individual capacity. (*Id.* at 9.)

types of income: they are paid an annual salary which is set "from time to time by the Judicial Conference of the United States," 28 U.S.C. § 753(e), and they also "may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference," 28 U.S.C. § 753(f). The federal government pays for transcripts it requests, as well as transcripts for parties proceeding in forma pauperis under the Criminal Justice Act or in habeas corpus proceedings. 28 U.S.C. § 753(f).

The Government uses the court reporters annual salary to compute employment benefits, such as their pension payments, but does not include the revenue that court reporters generate from preparing transcripts paid for by the Government. The Government considers court reporters to be independent contractors, as opposed to employees, while they are preparing transcripts. The court reporters assert that the failure to include their transcript revenue in computing employment benefits results in retired court reporters receiving pension payments that are disproportionately small compared with their true annual earnings. They argue that this exclusion violates their right to due process. Plaintiffs assert that they have a property interest in having all their earnings considered under the pension plan. They also argue that their right to procedural due process was violated because the Government deprived them of this property interest without affording them a notice or an opportunity to be heard.

Appendix G

Retirement benefits for federal employees, including court reporters, are determined pursuant to either the Civil Service Retirement System (CSRS), 5 U.S.C. §§ 8331-8351, or the Federal Employees' Retirement System (FERS), 5 U.S.C. §§ 8401-8479.[2] Under both systems, a retiree's annuity is calculated based on his "average pay", where average pay is defined as the largest annual rate calculated by averaging the employee's "basic pay" during any three consecutive years of creditable service. 5 U.S.C. §§ 8339, 8331(4) (CSRS); 5 U.S.C. §§ 8415, 8401(3) (FERS). The term "basic pay" is defined to exclude "bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation," with certain exceptions not applicable here. 5 U.S.C. § 8331(3) (CSRS); 5 U.S.C. § 8401(4) (FERS).

The court reporters also assert that the scheme used to give them salary raises is less beneficial than the step-in-grade system used for all other judiciary employees, and therefore violates their right to equal protection. There are three levels of salary for court reporters. Both length of service and merit are used to determine their salary level. Reporters start at Level 1 with a basic salary rate. They are promoted to Level 2 and receive a 5% increase over their basic salary rate when they either: (1) receive a certificate of merit from

---

2. Congress enacted FERS in 1986 as a successor to CSRS, which was established in 1920. Both systems remain in effect, but persons first employed on or after January 1, 1984, are automatically placed under FERS. *Anthony v. OPM*, 58 F.3d 620, 622 n.1 (Fed. Cir. 1995).

the National Court Reporters Association or pass an equivalent examination; or (2) serve as a full-time reporter with a district court for ten years. (Memorandum in Support of Defendants' Motion to Dismiss. Ex. 1. Guide to Judiciary Policies and Procedures, Vol. VI, Court Reporters' Manual at Ch. V, Part C.) Reporters are promoted to Level 3 and receive a 10% increase over the basic starting salary rate when they have both: (1) received a merit certificate or passed an examination; and (2) served for ten years.[3] (*Id.*)

Plaintiffs state that the two 5% level raises they can receive is less desirable than the Judiciary Salary plan that provides for step-in-grade pay increases for other judiciary employees. They also assert that unlike other judiciary employees, court reporters have not received a pay raise since 1973. However, according to the Court Reporters' Manual, "[a]ll salary rates will be adjusted upwards whenever there is a statutory increase for judiciary employees generally." (Memorandum in Support of Motion to Dismiss, Ex. 1, Guide to Judiciary Policies and Procedures, Vol. VI, Court Reporters' Manual at Ch. V, Part C.) Lastly, Plaintiffs argue that the limitations on salary increases compounds the problem of receiving less pension benefits.

---

3. In addition to three levels, salaries also vary slightly based on locality. In 1997, the rates of pay for the three levels in Chicago were $49,459, $ 51,932, and $54,405. (Memorandum in Support of Defendants' Motion to Dismiss, Ex. 2.)

Appendix G

II. DISCUSSION

A. *Subject Matter Jurisdiction*

The Government first argues that all of plaintiffs' claims should be dismissed for lack of subject matter jurisdiction. Alternatively, the Government asserts that Plaintiffs' due process claims could be dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6), or because they are insubstantial. Plaintiffs assert a violation of both substantive and procedural due process. They argue that they have a property interest in their future retirement benefits and that they were deprived of their property interest in the inclusion of transcript fee income for pension calculations. Plaintiffs assert that a procedural due process violation occurred because they were not given notice or an opportunity to be heard before they were deprived of their property interest. The government argues that the due process claims fail to state a claim because none of the Plaintiffs have retired yet and therefore do not currently have a property interest in their pension benefits. The government also asserts that Plaintiffs' claims must fail because their attempt to recast their garden variety retirement benefit claim in constitutional terms does not open the door for judicial review outside of that provided for by the administrative review scheme. *See Czerkies v. United States Dep't of Labor*, 73 F.3d 1435, 1442-43 (7th Cir. 1996) (en banc). Similarly, the government argues that Plaintiffs' due process claims could be dismissed because they are insubstantial. *See Paige v. Cisneros*, 91 F.3d 40, 44-45 (7th Cir. 1996). However, this

court need not explore the Government's alternative arguments for dismissal if this court lacks subject matter jurisdiction over the due process claims.

The Government asserts that Plaintiffs have brought this action in the wrong court. It argues that claims for civil service retirement benefits can only be brought in the United States Court of Appeals for the Federal Circuit after administrative review by the Office of Personnel Management (OPM) and the Merit System Protection Board (MSPB).

Both the CSRS and FERS create a three-part review process for resolving claims relating to retirement benefits. *Ayrault v. Pena*, 60 F.3d 346, 348 (7th Cir. 1995) (describing the administrative and judicial review scheme). First, Congress has designated the OPM to administer the CSRS and FERS, and to adjudicate all claims arising under the retirement system. 5 U.S.C. § 8347(a)-(b) (CSRS); 5 U.S.C. § 8461(b)-(c) (FERS). Second, Congress has directed that OPM's administrative actions and orders that affect "the rights or interests of an individual," may be appealed to the MSPB. 5 U.S.C. § 8347(d)(1) (CSRS); 5 U.S.C. § 8461(e)(1) (FERS). Third, except in discrimination cases, an employee aggrieved by a final order or decision of the MSPB can file a petition for review in the Federal Circuit, which has exclusive jurisdiction over such appeals. 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9).

Appendix G

A review of the legislative history of the CSRS illustrates Congress's reasoning behind the administrative review scheme. "A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action." *United States v. Fausto*, 484 U.S. 439, 444 (1988) (citing S. Rep. No. 95-969, at 3 (1978), 1978 U.S.C.C.A.N. 2723). "[T]he CSRA, . . . replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 445 (citing S. Rep. No. 95-969, at 4); *see Ayrault*, 60 F.3d at 348.

Plaintiffs disagree with the Government's contention that they are required to bring their claims under this administrative review system. However, both parties jointly moved to dismiss the first complaint, without prejudice and with leave to reinstated within one year from the dismissal, in order to provide Plaintiffs with an opportunity to pursue the administrative remedies. This court granted this motion and Plaintiffs raised the pension issue to the OPM. The OPM responded to their claim with an advisory opinion stating that income from transcript fees is in addition to base pay and not "creditable for retirement computation purposes." (Motion to Reinstate Complaint, Ex. F.) The OPM stated that a claim could not be adjudicated until there was a case where a court reporter actually applies for benefits and raises the issue of transcript fees. The OPM also made it clear that it was giving an advisory opinion

rather than adjudicating the Plaintiffs' claims, and that there is no right to appeal from an advisory opinion. Notwithstanding, the Plaintiffs appealed the OPM's advisory opinion to the MSPB. The MSPB issued an initial decision denying Plaintiffs a hearing and stated that they lacked jurisdiction over the appeal because the OPM advisory opinion was not appealable. (Memorandum in Opposition to Motion, Ex. 1.) The MSPB also stated that there was no case or controversy because none of the Plaintiffs had applied for retirement benefits. (*Id.* at 3 n.2) Plaintiffs filed a petition for review with the MSPB, but the parties' memoranda do not state whether the MSPB has responded to this petition. (Memorandum in Opposition to Motion, Ex. 2.)

Prior to appealing the OPM's advisory opinion to the MSPB, Plaintiffs filed a motion to reinstate their complaint before the Northern District of Illinois because their one year time period to reinstate their complaint was about to lapse. This court granted that motion. Despite Plaintiffs' attempt to litigate their claims in this court, they apparently have not abandoned their claims under the administrative scheme. Thus, they are attempting to litigate the identical issues in two fora simultaneously. Plaintiffs assert that they can bring their claims in this court because they "seek only non-monetary relief for constitutional violations." (Memorandum in Opposition to Motion to Dismiss at 9.) They also assert that they are not challenging the calculation of their pensions, "but rather the systemic violations of their constitutional right to equal protection and due process." (*Id.*)

Appendix G

Because Plaintiffs are seeking declaratory and injunctive relief for alleged constitutional violations, as opposed to attempting to bring a *Bivens* action, the precise issue is whether the administrative and judicial review scheme of the CS-RS and FERS precludes jurisdiction in the district courts. A circuit split exists over this issue and the Seventh Circuit has not specifically weighed in on this issue.

Several courts of appeals have held that the CSRA does not affect the general grant of federal question jurisdiction in 28 U.S.C. §1331 and waiver of sovereign immunity in 5 U.S.C. § 702 for cases seeking injunctive and declaratory relief, but not damages, for alleged constitutional violations. *Mitchum v. Hurt*, 73 F.3d 30, 35-36 (3rd Cir. 1995); *Hubbard v. EPA*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986), *vacated in part sub nom. Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc). However, three other circuits have held that the CSRA precludes both monetary and equitable relief. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991); *Stephens v. Dep't of Health and Human Services*, 901 F.2d 1571, 1575-77 (11th Cir. 1990); *Lombardi v. Small Bus. Admin.*, 889 F.2d 959, 961-62 (10th Cir. 1989). In *Paige*, 91 F.3d at 44, the Seventh Circuit declined to decide this jurisdictional issue and instead found that "Paige lacks the sort of substantial constitutional claim that activates the rule requiring doubts to be resolved in favor of judicial review."

The main case that Plaintiffs rely on to assert that the Northern District of Illinois has jurisdiction over

this case is *Czerkies v. United States Dep't of Labor*, 73 F.3d 1435 (7th Cir. 1996) (en banc). In *Czerkies*, a federal employee brought an action against the Department of Labor for denying workers' compensation benefits for an on the job injury without due process. The Department of Labor argued that the district court did not have jurisdiction to hear his claim in light of the Federal Employees Compensation Act (FECA), which provides that:

> (b) The action of the Secretary or his designee in allowing or denying a payment under this [Act] is—
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b). The Seventh Circuit discussed what effect door-closing statutes, such as the one in FECA, have on constitutional claims. "The circuits are in agreement: door closing statutes do not, unless Congress expressly provides, close the door to constitutional claims, provided that the claim is colorable and the claimant is seeking only a new hearing or other process rather than a direct award of money by the district court." *Czerkies*, 73 F.3d at 1439.

However, the situation faced by the court reporters is starkly different than that faced by Czerkies, who had no appellate remedies of any kind. In this case, the court reporters are not restricted from any judicial review. The CSRS and FERS not only allow for an appeal to the MSPB, but also allow claimants to present their claims to the Federal Circuit. 5 U.S.C. § 7703(b)(1); *Ayrault*, 60 F.3d at 349 (appropriate forum for judicial review of claim under CSRS is the Federal Circuit). Therefore, this case does not present a situation where Plaintiffs would be denied any judicial review for the alleged constitutional violations if the district court concludes that it lacks subject matter jurisdiction. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215-216 (1994) (district court jurisdiction over alleged due process violation precluded by the administrative review scheme of the Federal Mine Safety and Health Amendments Act because review scheme provided for review by appropriate court of appeals); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (district court lacks jurisdiction to hear constitutional claim relating to denial of Social Security insurance benefits until a final decision of the Secretary as provided for in the administrative review scheme, 42 U.S.C. 405(g)-(h)); *Bisson v. Office of Personnel Management*, 908 F.2d 947, 950 (Fed. Cir. 1990) (as part of administrative review scheme covering retirement benefits, proper jurisdiction was in the Federal Circuit to hear employees claim that his equal protection right was violated when he was not given retirement credit under the CSRS for the time he worked as a "private roll" employee of the Smithsonian Institution.). Despite Plaintiffs' contentions, a finding

by this court that we do not have jurisdiction would not "slam[ ] the courthouse door in the face of holders of constitutional claims." *Czerkies*, 73 F.3d at 1441. Therefore, this court grants the Government's motion to dismiss for lack of subject matter jurisdiction Plaintiffs' claims relating to the calculation of pension benefits and base pay.[4]

B. *Equal Protection Claim*

Having found that this court lacks subject matter jurisdiction over Plaintiffs' due process claim, the remaining claim before this court is Plaintiffs' equal protection claim relating to the disparity between their system of salary raises and the step-in-grade system of other judicial employees. Plaintiffs argue that their right to equal protection was violated because they are treated less favorably than other judiciary employees who receive salary increases under a step-in-grade pay system. Neither the CSRS nor the FERS discuss how raises are determined. Court reporters salaries are discussed in 28 U.S.C. § 753(e)-(f), which provides that the Judicial Conference of the United States shall set court reporters' salaries. Raises for court reporters are explained in the Guide to Judiciary Policies and Procedures, Vol. VI, Court Reporters' Manual at Ch. V, Part C. (Memorandum in Support of Defendants'

4. If Plaintiffs had exhausted their administrative remedies before the OPM and MSPB before reinstating their complaint in this court, it might be proper to transfer this case to the Federal Circuit pursuant to 28 U.S.C. § 1631.

Motion to Dismiss, Ex. 1.) Because Plaintiffs challenge the constitutionality of 28 U.S.C. § 753(e)-(f) and the salary scheme established by the Judicial Conference under the authority of that statute, this court has jurisdiction over this claim pursuant to 28 U.S.C. § 1331.

The Government argues that this part of the complaint should be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). "'[A] complaint [or part of a complaint] should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Gastineau v. Fleet Mortgage Corp.*, No. 96-3145, slip op. at 5 (7th Cir. Feb. 23, 1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The Government cites to *Peterson v. Lindner*, 765 F.2d 698, 705 (7th Cir. 1985), for the proposition that, in order to state a claim, Plaintiffs must allege "that the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Id.* (internal quotation marks omitted).

The salary scheme challenged by Plaintiffs neither burdens a suspect classification nor implicates a fundamental right; therefore, this claim will be subject to the rational relationship test, which mandates that legislation is presumptively valid and will be upheld so long as it is rationally related to a legitimate governmental interest. *Kaplan v. United States*, 133 F.3d 469, 474 (7th Cir. 1998). Plaintiffs clearly allege in

their complaint that "[t]here is no rational basis for treating Court Reporters differently than other federal employees, including judiciary employees." (Second Amended Complaint at ¶ 25.) Therefore they have sufficiently stated a claim and the Government's motion to dismiss the equal protection claim for lack of subject matter jurisdiction or failure to state a claim is denied.

Despite the fact that Plaintiffs have successfully stated a claim, it is highly unlikely that they will be able to survive a motion for summary judgment on this issue because they will bear the heavy burden of having to create a genuine issue of material fact that their salary scheme is not rationally related to a legitimate governmental interest. *Kaplan*, 133 F.3d at 474 (affirming grant of summary judgment under rational relationship test); *Smith on Behalf of Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997) (same); *University Professionals of Illinois, Local 4100, IFT-AFT, AFL-CIO v. Edgar*, 114 F.3d 665, 667 (7th Cir. 1997) (in order for the Government to defeat Plaintiffs' equal protection claim it need only proffer a sound reason for the legislation).

IV. CONCLUSION

This court lacks subject matter jurisdiction over Plaintiffs' claims relating to the calculation of pension benefits and base pay because the administrative review scheme provided for under the CSRS and FERS allows for judicial review in the Federal Circuit. This court does have jurisdiction over Plaintiffs' equal protection claim

and Plaintiffs adequately stated such a claim. Therefore, Plaintiffs' challenges to the calculation of pension benefits and base pay are dismissed, and the Government's motion to dismiss Plaintiffs' equal protection claim is denied. The government is invited to file a motion for summary judgment within 30 days of the date of this memorandum opinion. Plaintiffs shall have 10 days thereafter to respond to the summary judgment motion.

ENTER:

s/ Richard A. Posner
RICHARD A. POSNER, Chief Judge
United States Court of Appeals
for the Seventh Circuit

DATED: March 9, 1998

Supreme Court, U.S.
FILED
JAN 28 2010
OFFICE OF THE CLERK

No. 09-543

In the Supreme Court of the United States

ANTHONY W. LISANTI, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
TODD M. HUGHES
MEREDYTH COHEN HAVASY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the income that petitioner, a federal court reporter, earned for the preparation of transcripts at the request of private parties appearing before the court falls outside the definition of "basic pay" as defined by 5 U.S.C. 8331(3).

2. Whether the Merit Systems Protection Board abused its discretion when it refused to certify petitioner's case as a class action on behalf of all similarly situated federal court reporters.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 11

TABLE OF AUTHORITIES

Cases:

American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974) 10

Certain Former CSA Employees v. *Department of Health & Human Servs.*, 762 F.2d 978 (Fed. Cir. 1985) 9, 10

Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983) .. 10

Cutright v. *United States*, 953 F.2d 619 (Fed. Cir.), cert. denied, 506 U.S. 821 (1992) 2

Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985) 9

United States v. *Fausto*, 484 U.S. 439 (1988) 6

Statutes, regulation and rule:

5 U.S.C. 8331(3) ..... *passim*
5 U.S.C. 8339(a) 6
5 U.S.C. 8347(d)(1) 5
28 U.S.C. 753(f) 2, 5
5 C.F.R. 550.103 ..... 5, 6
Fed. R. Civ. P. 23(a)(1) 10

In the Supreme Court of the United States

No. 09-543

ANTHONY W. LISANTI, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-19a) is reported at 573 F.3d 1334. The initial decision of the Merit Systems Protection Board (MSPB or Board) (Pet. App. 22a-29a) is unreported. The final order of the Board (Pet. App. 20a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2009. The petition for a writ of certiorari was filed on October 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a court reporter for the federal court system from 1970 until his retirement in 2006. Pet. App. 2a. As a court reporter, he had two primary

duties: (1) recording judicial proceedings; and (2) producing transcripts of those proceedings for the courts and the parties upon request. *Ibid.*

Prior to 1984, court reporters were part-time federal government employees who negotiated their own rates for producing transcripts and engaged in freelance work outside of their federal court reporter duties. Pet. App. 2a-3a; *Cutright* v. *United States*, 953 F.2d 619, 622 (Fed. Cir.), cert. denied, 506 U.S. 821 (1992). After 1984, court reporters became full-time federal government employees with benefits and a larger annual salary. Pet. App. 3a. They continued to collect fees from parties for producing transcripts "at rates prescribed by the court subject to the approval of the Judicial Conference." 28 U.S.C. 753(f). Thus, federal court reporters receive a full-time, fixed salary from the court system and additional outside income from parties for transcript services. Pet. App. 3a.

Petitioner's retirement benefits are provided by the federal government under the Civil Service Retirement System (CSRS). Pet. App. 2a. During his employment, both petitioner and his employer, the Administrative Office of the United States Courts (Administrative Office), made periodic contributions to the Civil Service Retirement and Disability Fund (CSRS fund). *Id.* at 4a. The contributions were calculated using petitioner's "basic pay," as defined in 5 U.S.C. 8331(3). Pet. App. 4a. The agency considered his "basic pay" to be his annual salary, and not the larger amount of additional income he earned from private parties when he prepared transcripts. *Ibid.* When an employee retires, the Office of Personnel Management (OPM) also uses "basic pay" to calculate the employee's retirement annuity. *Id.* at 5a.

2. In 1996, in anticipation of retirement, petitioner and nine other court reporters sued the Administrative Office in the United States District Court for the Northern District of Illinois, asserting that the income earned from preparing transcripts for parties had been unlawfully excluded from the calculation of their retirement benefits. Pet. App. 5a. The district court dismissed the claim for lack of jurisdiction and held that there is an exclusive review process for challenging retirement benefits, consisting of adjudication by OPM, appeal to the MSPB, and petition for review in the United States Court of Appeals for the Federal Circuit. *Ibid*; *id.* at 43a-58a. Simultaneously, petitioner and the other court reporters raised their claim with OPM and appealed to the MSPB, which dismissed for lack of jurisdiction because none of the court reporters had yet retired and applied for retirement benefits. *Id.* at 5a.

3. When petitioner retired in 2006, he began receiving a retirement annuity calculated using his basic pay, which did not include the additional income he received from parties for preparing transcripts. Pet. App. 6a. He challenged the calculation before OPM. *Ibid.* In its initial decision, OPM determined that it had correctly calculated his annuity by using his annual salary as certified by the Administrative Office as his basic pay. *Ibid.* OPM further determined that it had no authority to include his transcript income in his basic pay because it did not fall within the definition of "basic pay" under 5 U.S.C. 8331(3). *Ibid.* In a reconsideration decision, OPM upheld its initial decision, stating that "there is no provision in the law for including" transcript income. *Ibid.*

4. Petitioner appealed OPM's decision to the MSPB and moved to certify the appeal as a class action on be-

half of himself and all other court reporters similarly situated. Pet. App. 6a. The MSPB administrative judge denied the class certification motion because petitioner did not assert that any of the putative class members had exhausted their administrative remedies and thus failed to establish that the MSPB had jurisdiction over them. *Ibid.* The Board also declined to waive the exhaustion requirement for the putative class members. *Ibid.*

On the merits, the Board held that it lacked authority to review OPM's reliance upon the Administrative Office's certification of petitioner's basic pay. Pet. App. 27a. The administrative judge stated that petitioner was required to seek redress from the Administrative Office in the form of an amended certification before OPM could properly adjust his annuity. *Id.* at 28a. Accordingly, the administrative judge affirmed OPM's reconsideration decision. *Ibid.*

Petitioner filed a petition for review with the full Board, which denied the petition, concluding that there was "no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affect[ed] the outcome." Pet. App. 21a.

5. Petitioner then appealed to the Federal Circuit, which affirmed the Board's holding. Pet. App. 1a-19a. The court disagreed with the MSPB's holding that OPM lacked authority to determine petitioner's basic pay and that the Board, therefore, lacked authority to review OPM's determination. *Id.* at 10a. The court held that although the employing agency must certify an employee's basic pay, OPM is required under the CSRS to review the agency's legal determination of which categories of income qualify as basic pay. *Ibid.* Further, an OPM decision that affects "the rights or interests of an

individual" may be appealed to the Board. *Id.* at 11a (quoting 5 U.S.C. 8347(d)(1)). The court noted that the Board's determination that petitioner could seek redress from only the Administrative Office would have effectively left him without a judicial remedy. *Ibid.*

Although the Board did not rely upon OPM's interpretation of "basic pay" as defined by 5 U.S.C. 8331(3), the court determined that it could address the correct interpretation of the statute because it was a question of law that OPM had decided in the first instance. Pet. App. 13a.

The court affirmed OPM's determination that the term "basic pay" does not include transcript income. The court held that, although 28 U.S.C. 753(f) sets forth the maximum amount that a court reporter may charge for transcripts, it is not pay "of the position as fixed by law or regulation" as base pay is defined. Pet. App. 15a (quoting 5 U.S.C. 8331(3), and citing 5 C.F.R. 550.103). The court noted that there is no statute or regulation that establishes the number of transcript orders a court reporter may receive, so his or her pay for those orders is not "fixed by law." *Id.* at 15a-16a. The court analogized transcript fees to bonuses and overtime pay, neither of which are included in "basic pay." *Id.* at 16a-17a.

The court further held that transcript income is not "similar" to a "special rate supplement" that is included in the definition of "basic pay" under 5 C.F.R. 550.103. Rather, transcript income is more similar to overtime pay, which is explicitly excluded from basic pay. Pet. App. 17a. The court noted that though the Internal Revenue Service (IRS) treated petitioner's pay as part of his earned income, the income categories defined by the IRS for taxation purposes are not relevant to the statu-

tory definition of "basic pay" for purposes of calculating pension annuities. *Id.* at 18a.

Finally, the court held that, because it found that petitioner's transcript income did not qualify as "basic pay," his request for class certification was moot. Pet. App. 19a.

ARGUMENT

Petitioner contends that the transcript income of federal court reporters should be considered "basic pay" for purposes of calculating pension annuities under 5 U.S.C. 8339(a) and that the Board abused its discretion when it denied petitioner's request for class certification. There is no merit to petitioner's claims and they do not warrant further review.

1. The Federal Circuit correctly held that the transcript income of federal court reporters does not constitute "basic pay." There is no reason for this Court to second-guess the Federal Circuit's well-reasoned holding, guided by its expertise in this area of law. See *United States* v. *Fausto*, 484 U.S. 439, 465 n.11 (1988) (Stevens, J., dissenting) ("Because of the unique character of the Federal Circuit, its conclusions are entitled to special deference by this Court. * * * The Federal Circuit's exclusive jurisdiction [to review MSPB decisions] renders it uniquely qualified to determine whether the CSRA implicitly works a partial repeal of Tucker Act/Back Pay Act jurisdiction.").

Petitioner argues that "basic pay" is defined as "pay fixed by law or administrative action for the position," Pet. 18 (quoting 5 C.F.R. 550.103, and citing 5 U.S.C. 8331(3)), and that transcript services fall within that definition because the Judicial Conference fixes the maximum rates that federal court reporters may charge

for transcript services. Pet. 18-19. The maximum *rates* for transcript services are certainly fixed by administrative action, but the *pay* that federal court reporters receive from transcript services is not. As the Federal Circuit noted, "the Administrative Office does not determine or control how much money a court reporter will earn from transcript orders." Pet. App. 16a. There is no statute or regulation that mandates that parties purchase transcripts or sets the number or length of the transcripts that a court reporter will produce in a given year. Moreover, the Judicial Conference fee schedule is a ceiling and court reporters are free to negotiate lower rates with the parties. Thus, the pay that federal court reporters earn from transcript services is not "fixed by law or regulation," but rather varies widely based on the demands of third parties.

Petitioner's argument that transcript income should be included in "basic pay" because it is income earned for performing the statutory functions of a court reporter is equally unavailing. Pet. 22. Job function is irrelevant to the definition of basic pay. Indeed, employees working overtime likely to perform the same functions that they perform during regular working hours, yet overtime pay is specifically excluded from "basic pay" in the statute. See 5 U.S.C. 8331(3).

Nor does the degree of control that an employer exercises over the tasks of an employee determine whether the pay for those tasks are considered "basic pay." Petitioner contends that the Administrative Office "controls nearly every aspect" of the production of transcripts (Pet. 24-25), but that has no bearing on whether the payment for those services constitutes "basic pay." After all, an agency exercises the same degree of control over the work of an employee working overtime as it does

over the same employee during regular working hours, yet overtime pay is not "basic pay." See 5 U.S.C. 8331(3).

Finally, petitioner notes that the IRS and the Social Security Administration categorized his transcript income as earned income, not as self-employment income. Pet. 15, 23. The statutory regime governing income taxation is entirely different from that governing pension benefits. Accordingly, the Federal Circuit correctly held that "the income categories defined by the Internal Revenue Code are not relevant to the definition of 'basic pay.'" Pet. App. 18a.

2. Contrary to petitioner's claims, the Federal Circuit's decision will neither threaten the pensions of other federal government employees nor undermine the employment rights of federal court reporters. The opinion is limited to the narrow holding that the transcript income of federal court reporters does not constitute "basic pay" for purposes of calculating pension annuities.

Petitioner's assertions about the far-reaching implications of this case are based on the mistaken assumption that the decision turns on the classification of federal court reporters as both federal employees and independent contractors. See, *e.g.*, Pet. i, 13-14, 19, 26. However the court did not hold that federal court reporters act as independent contractors when they perform transcript services, nor did it base its determination that transcript income is not part of "basic pay" on the employment status of federal court reporters. The Federal Circuit's decision was based entirely on the statutory and regulatory definition of "basic pay."

Further, the cases that petitioner cites (Pet. 23-24) holding that federal court reporters are federal government employees and not independent contractors are

fully consistent with the Federal Circuit's conclusion that transcript income is not "basic pay." Indeed, there are many types of income, including overtime pay, bonuses, and allowances, earned by other federal government employees that are excluded from "basic pay," 5 U.S.C. 8331(3), but that does not render those employees independent contractors.

The Federal Circuit's decision has nothing to do with whether federal court reporters are independent contractors or federal government employees. Accordingly, it neither authorizes the federal government to manipulate the pension benefits of its employees by classifying them as independent contractors nor leaves the employment rights of the federal court reporters in a "state of flux." Pet. 26. There are no significant precedential implications of this case that warrant this Court's review.

3. Even if this Court were to grant the petition and reverse the Federal Circuit's holding that transcript income is not "basic pay," review of the class certification issue is not warranted because the MSPB's decision not to grant class certification was largely fact-based, see Pet. App. 31a-32a, and this Court generally does not review factual findings made below. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985). Further, the MSPB enjoys broad discretion to grant class action status, *Certain Former CSA Employees* v. *Department of Health & Human Services*, 762 F.2d 978, 986 (Fed. Cir. 1985), and the MSPB did not abuse its discretion in denying class certification in this case.

The MSPB held that because petitioner did not assert that other members of the putative class had exhausted their administrative remedies, he did not meet his burden of establishing that the MSPB possessed ju-

risdiction over any of their claims, and thus had not met the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1). Pet. App. 31a-33a. Even setting aside the exhaustion issue, there is no evidence in the record to support petitioner's assertion that the potential class includes over 100 federal court reporters nationwide. Pet. 28.

Petitioner does not contend that the MSPB abused its discretion by failing to certify the class of federal court reporters. Instead, petitioner seeks to impose an unprecedented, less deferential standard of review by arguing that the MSPB's failure to grant class certification in this case should be reversed because it undermines the purpose of class certification as articulated in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) (*American Pipe*)—namely "the promotion of efficiency and economy of litigation." Pet. 28-31. Those cases cannot bear the weight of petitioner's argument. They established procedural rules about the tolling of statutes of limitations during pending class certification motions and justified those rules in part because they were consistent with judicial economy and efficiency. See *Crown, Cork & Seal*, 462 U.S. at 349; *American Pipe*, 414 U.S. at 554-555. In essence, petitioner attempts to transform a policy justification for a procedural rule into a legal standard under which to review individual class certification decisions. Pet. 29-30. His theory is entirely inconsistent with the discretion accorded to the MSPB in determining class action status. See *Certain Former CSA Employees*, 762 F.2d at 986.

The MSPB did not abuse its discretion when it decided not to waive the exhaustion requirement for the

putative class members and to deny class certification in this case. Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
TODD M. HUGHES
MEREDYTH COHEN HAVASY
Attorneys

JANUARY 2010